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No. _____

In the Supreme Court of the United States

CHERYL K. MCPHAUL,
Petitioner,

v.

MADISON COUNTY BOARD OF HEALTH, BOARD OF COMMISSIONERS OF MADISON COUNTY, and ARLEEN HORINE, in her official and individual capacity,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a plaintiff is disabled if suffering the effects of a disorder for a period of time before a diagnosis and treatment plan were rendered and if that disabled person is a qualified individual if the work performance was adequate prior to the suffering of the disorder but work performance declined afterwards and no accommodations were offered?

Whether the plaintiff has shown that the reasons proffered by the respondents were pretextual to avoid an adverse summary judgment ruling?

Whether a hostile work environment can be created through the use of racially insensitive terms and topics by a co-worker despite the fact that the terms and topics are not directed at someone who is in the racial class but can be heard by that person?

PARTIES TO THE PROCEEDING

Petitioner

Cheryl K. McPhaul is an individual with no corporate affiliations.

Respondents

Board of Commissioners of Madison County, Indiana, Arleen Horine, and Madison County Board of Health.

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The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 226 F.3d 558 (7th Cir. 2000). A copy of the Opinion is included in the Appendix at Appendix A at 1a-18a. The Opinion of the District Court for the Southern District of Indiana is published at 976 F. Supp. 1190 (S.D. Ind. 1997) and is included in Appendix B at 21a-52a. The District Court ordered entry of the final judgment on December 11, 1998 which is included in Appendix B at 19a-20a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its Opinion on August 16, 2000. This Petition for Writ of Certiorari was due within ninety (90) days after the United States Court of Appeals issued its Opinion, November 14, 2000. On November 6, 2000, the Supreme Court of the United States, however, granted Petitioner until January 13, 2001 to file this Petition for Writ of Certiorari. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. VI, cl. 2
Supremacy Clause

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the

Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

42 U.S.C. § 12112

Equal Opportunity for Individuals with Disabilities

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

* * * * *

U.S. Const., Amendment XIV, Sec.1

Equal Protection Clause

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

42 U.S.C. § 1983

Civil Rights, Generally

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner, Cheryl McPhaul, is a female African American. Ms. McPhaul is a registered nurse and has been licensed since 1987. In 1994, Ms. McPhaul was employed as a nurse nutritionist with the Madison County (Indiana) Women, Infants, and Children Program. Respondents Board of Commissioners of Madison County, Indiana and Madison County Board of Health ran and funded the Program. Respondent Arleen Horine was Ms. McPhaul's immediate supervisor.

In February 1995, Ms. McPhaul underwent successful treatment of cancer. When she returned to work, however, Ms. McPhaul began to experience health problems. In May 1995, the situation began to affect her work. Therefore, Respondents transferred Ms. McPhaul to another position, intake clerk. Ms. McPhaul's situation did not improve. So after her first evaluation as intake clerk, Ms. McPhaul explained her situation and requested a change in schedule to improve her performance. The request was denied.

Meanwhile, Ms. McPhaul continued to seek medical help for her condition. After another poor evaluation, Ms. McPhaul was able to go to the Mayo Clinic in January 1996. Needing to return to work, Ms. McPhaul did not receive a clear diagnosis of her condition, but had made headway. Returning to work, Ms. McPhaul received another poor evaluation and was subsequently terminated. Shortly after this termination, Ms. McPhaul was diagnosed with fibromyalgia.

During Ms. McPhaul's time as an intake clerk, a Caucasian co-worker repeatedly made a series of comments in which the term "nigger" or a history of race relations was

used or discussed. These comments did not directly refer to Ms. McPhaul. Ms. McPhaul, however, reported these remarks to her supervisor and the supervisor was present during one of the statements. The supervisor eventually gave Ms. McPhaul a separate office from the co-worker, but did not request that the comments stop. Instead, Ms. McPhaul was told to ignore them.

On January 22, 1997, Ms. McPhaul filed her initial complaint alleging that she suffered employment discrimination in violation of the Americans with Disability Act. On September 12, 1997, Ms. McPhaul filed an amended complaint alleging she suffered employment discrimination in violation of the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution enforced through 42 U.S.C. § 1983. Within that amended complaint, Ms. McPhaul alleged retaliation under Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e et. seq.

The District Court had jurisdiction over the original action pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 12117 because the case presented federal questions arising in claims regarding equal protection in employment and the employment of employees with disabilities. Respondents filed motions for summary judgment pursuant to Federal Rule of Civil Procedure 56, claiming that no genuine issues of material fact existed and Respondents were entitled to judgment as a matter of law. The District Court granted the motions on the ground that Ms. McPhaul was not disabled and no racial discrimination had occurred. Appendix, App., B at 34a-35a. The District Court entered judgment on December 11, 1998.

Ms. McPhaul filed a timely appeal with the Court of Appeals for the Seventh Circuit. On August 16, 2000, the

Court of Appeals affirmed the District Court's judgment. On the ADA claim, the Court of Appeals reserved the determination that Ms. McPhaul was disabled, but stated that she was not a qualified individual. App. A at 18A. As to the equal protection issues, the Court of Appeals found that insufficient evidence existed to find that Ms. McPhaul was discriminated against. App. A at 18A.

ARGUMENT FOR GRANTING THE WRIT

On the Americans with Disabilities Act claim, the Court of Appeals affirmed the District Court's decision on the basis that Ms. McPhaul was not a qualified individual in order to establish her claim. The Court of Appeals did not address the issue of whether Ms. McPhaul was disabled which was the basis for the District Court's decision. Ms. McPhaul suffered a medical disorder shortly after recovering from cancer. This medical disorder affected her major life activities. Despite seeking medical attention, the physicians were unable to help Ms. McPhaul. After a poor performance evaluation, Ms. McPhaul suggested an accommodation which she hoped would improve her performance. The suggestion was rejected. Meanwhile, Ms. McPhaul sought further medical assistance. When the medical assistance finally got its foot in the door, Ms. McPhaul was called back to work. But after returning to work, she was terminated. Shortly after the termination, a physician finally diagnosed Ms. McPhaul's condition, fibromyalgia. All during her employment, Ms. McPhaul was a qualified individual. She had the degrees and skills for the work. She performed the nutritionist position without incident until her return from the cancer treatment. Moving to a lower position, Ms. McPhaul could reasonably be expected to perform these tasks as intake clerk. Her difficulties arose from the undiagnosed fibromyalgia and she

sought accommodations pending the diagnosis which were rejected. Therefore, Ms. McPhaul was qualified.

On the discrimination claim, the Respondents provided various reasons they allege were legitimate and non-discriminatory on why Ms. McPhaul was treated as she was. Ms. McPhaul provided evidence on why these reasons were pretextual. Such evidence included no basis in fact, the action was not warranted, and non-protected individuals were treated differently. Therefore, Ms. McPhaul has provided the necessary facts to support her burden on the McDonnell burden shifting test to avoid an adverse ruling on a motion for summary judgment.

On the hostile work environment claim, the Court of Appeals found that a co-worker's racially insensitive comments not directed towards a person did not rise to the level of being objectively hostile. While the Court of Appeals understood that such comments would be offensive to Ms. McPhaul, the District Court found that the comments were not objectively and subjectively hostile. Ms. McPhaul stated that she was offended and tired of the comments. Much of the reasoning for stating that a reasonable person would not be offended is derived from the thought that the comments were not directed at Ms. McPhaul. Yet the comments showed a continued insensitivity to which Ms. McPhaul asked the supervisor to do something about it and a reasonable person could be offended by the nature and frequency of the comments. The comments continued despite Ms. McPhaul's complaints to the supervisor. Therefore, Ms. McPhaul has provided the necessary facts to support her burden in the burden shifting test described in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) to avoid an adverse ruling on a motion for summary judgment.

ARGUMENT 1

The plaintiff was disabled because she suffered the effects of a disorder for a period of time before a diagnosis and treatment plan were rendered and that she was a qualified individual as her previous work performance was adequate but work performance declined after suffering the disorder and no accommodations were offered.

The Americans with Disabilities Act (ADA) proscribes discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, . . . and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The Act also provides that discrimination against a qualified individual with a disability occurs when an employer does not make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability. 42 U.S.C. § 12112(b)(5)(A).

To establish a prima facie case for failure to accommodate under the ADA, a plaintiff must show that: (1) he or she was disabled; (2) the defendant was aware of the disability; and (3) the plaintiff was a qualified individual who, with or without reasonable accommodation, could perform the essential functions of the employment position. Feldman v. American Memorial Life Ins. Co., 196 F.3d 783, 789 (7th Cir. 1999). Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1284-1285 (7th Cir. 1996) had the third element broken down into two separate parts: (a) the plaintiff was an otherwise qualified individual who could satisfy the

essential requirements of his or her job with or without accommodation and (b) his or her employer failed to take reasonable steps to accommodate his or her disability.

For the first element, the ADA defines a disability as: (1) a physical or mental impairment that substantially limits one or more of the major life activities; (2) a record of such impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(2). An impairment includes any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine. 29 C.F.R. § 1630.2(h). Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). Substantially limits means unable to perform a major life activity that the average person in the general population can perform or significantly restricted as to the condition under which the individual can perform the major life activity compared with a person in the general population. 29 C.F.R. § 1630.2(j). In determining whether an impairment is substantially limiting the court should consider: (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. Hamm v. Runyon, 51 F.3d 721, 725 (7th Cir. 1995) *quoting* 29 C.F.R. § 1630.2(j).

Whether the employed individual is disabled is to be made on an individualized, or case by case basis. The determination must not be made on the basis of general

information about how an uncorrected impairment usually affects individuals, but rather than on the individual's actual condition. Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S.Ct. 2139, 2147, 144 L.Ed.2d 450 (1999).

Here, the condition at issue is fibromyalgia. Fibromyalgia is a physiological disorder which affects the neurological, musculoskeletal, respiratory, and cardiovascular systems of Ms. McPhaul. Ms. McPhaul complained of fatigue, insomnia, muscle pain, shortness of breath, difficulty writing, difficulty concentrating, depression, anxiety, pain, temperature intolerance, irritable bowels, frequent urination, and worrying about her condition. McPhaul Deposition, McPhaul Depo., 45, 49, 50, 51-52, 53; App. 56a, 60a, 61a, 64a. Based on her description and subsequent diagnosis, Ms. McPhaul's major life activities were affected. She had difficulties with manual tasks (writing), walking (getting tired and the soreness), caring for one's self (bathing problems, McPhaul Depo.50; App. 60a), and working (her concentration plus these other factors). The fibromyalgia as an impairment substantially limited, defined as significantly restricted, these major life activities. Fibromyalgia includes chronic fatigue (see McPhaul Depo. 81; App. 74a); therefore, it is long term by definition. Because of the chronic fatigue, only the symptoms can be treated, but not the disorder itself. Therefore, Ms. McPhaul will continue to suffer under this condition until fibromyalgia's cause is known and a cure is established (see McPhaul Depo. 51; App. 61a). Ms. McPhaul is significantly restricted as she must endure the pain involved in doing her tasks and must take more time (in performing the task and resting during and longer than the average person).

The timing of the diagnosis of Ms. McPhaul as suffering fibromyalgia is irrelevant. Ms. McPhaul suffered under these conditions for several months. Not until she

made it to the Mayo Clinic in January 1996 was headway made. Shortly after Mayo Clinic made the first step, Dr. Hughes confirmed the Mayo Clinic's impression. McPhaul Depo. 62; App. 71a. Much as a person who suffers from poor vision, it is irrelevant if the problem is caused by faulty focusing which can be corrected by glasses or non-treatable cataracts. The person experienced the vision problems before the diagnosis was made. Whether accommodations should continue is determined by that diagnosis (glasses stop the accommodations while accommodations remain with the cataracts).

In this case, Ms. McPhaul developed the fibromyalgia after her successful fight with cancer in February 1995 and it caused constant pain beginning in May 1995. McPhaul Depo. 82; App. 76a. Since that time, Ms. McPhaul endured the condition of fibromyalgia including that period in September 1995 when she requested a schedule change. McPhaul Depo. 58; App. 68a. Meanwhile, Ms. McPhaul sought medical help to alleviate her condition, but the physicians were unable to help her. McPhaul Depo. 56, 57; App. 66a, 67a. In January 1996, a possible name with the potential for treatment was provided by the Mayo Clinic. McPhaul Depo. 46; App. 56a-57a. The confirmation of that label came with Dr. Hughes in February 1996 with the unfortunate fact that the condition is presently non-treatable. Ms. McPhaul suffering the effects of fibromyalgia for approximately one year before the diagnosis does not change the fact she did indeed suffer those effects without the diagnosis.

In the alternative, Respondents regarded Ms. McPhaul as having an impairment. Ms. McPhaul's history of health problems was known to the Respondents. The Respondents shifted Ms. McPhaul into another position in hopes that Ms. McPhaul would become more productive. McPhaul Depo.

111-112; App. 83a. Ms. McPhaul made Ms. Horine aware of her tiredness in September 1995 when Ms. McPhaul requested a schedule change. McPhaul Depo. 58; App. 68a. Ms. McPhaul took time off to go the Mayo Clinic and the Respondents told Ms. McPhaul to return to work before the Mayo Clinic could confirm its initial impression of fibromyalgia. McPhaul Depo. 47, 48; App. 58a, 59a. Even after returning to work from the Mayo Clinic, the Respondents requested further paperwork from the Clinic. McPhaul Depo. 161; App. 97a. At the time of Ms. McPhaul's termination, the Respondents commented on Ms. McPhaul's evaluations and that Ms. McPhaul was "too sick to work." McPhaul Depo. 172; App. 98a. Based on these factors, the Respondents considered Ms. McPhaul to be disabled.

The focus on the lack of restriction orders by a physician is misplaced. Pointing back to the earlier illustration, a person will suffer vision problems before the condition is labeled and, hopefully, corrected. Here, Ms. McPhaul suffered fibromyalgia and sought ways to have it corrected. When she returned from the Mayo Clinic due to the need to return to work, the Mayo Clinic only gave its impression as to what Ms. McPhaul was suffering. Without further examinations and a complete diagnosis, Mayo Clinic could not provide Ms. McPhaul with an appropriate treatment plan. When Dr. Hughes finally provided the diagnosis, work restrictions were useless as the Respondents had already terminated Ms. McPhaul. The diagnosis was February 1, 1996 and Ms. McPhaul was terminated January 22, 1996. McPhaul Depo. 49; App. 59a.

Therefore, Ms. McPhaul has shown that she was disabled.

For the second element, Ms. McPhaul refers back to the above paragraph in which Ms. McPhaul described how the Respondents perceived her as being disabled. Based on the factors described above for regarding Ms. McPhaul as disabled, the Respondents were aware of Ms. McPhaul's disability. Ms. McPhaul had suffered under fibromyalgia for a period of time. Ms. McPhaul spoke to Respondents about how the doctors were unable to help her. McPhaul Depo. 56; App. 66a. Respondents knew that Ms. McPhaul was going to the doctors to help find an alleviation from her problem. McPhaul Depo. 84; App. 78a. The only thing that neither party knew was the name of what Ms. McPhaul suffered during this time and how to correct it.

Therefore, Ms. McPhaul has shown that Respondents were aware of her disability.

For the third element, a qualified individual with a disability is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8). 29 C.F.R. § 1630.2 (m) defines a qualified individual as an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

First, Ms. McPhaul has shown that she had the qualifications to perform the job. She received her degree in nursing around June 1987. McPhaul Depo. 10; App. 53a-54a. Almost immediately after her graduation, Ms. McPhaul began working as a nurse. McPhaul Depo. 10; App. 54a. Ms. McPhaul was retained by Respondents' facility in April

1994. Therefore, Ms. McPhaul at least met the requirements and qualifications of the position. Nothing arises about Ms. McPhaul's performance until May 1995, one year after her initial hiring, and three months after the effects of the fibromyalgia surfaced. Therefore, Ms. McPhaul has shown that she was qualified for the position and could do the essential functions of the positions without restrictions.

However, Ms. McPhaul began to experience her medical problems after her cancer surgery in February 1995. Ms. McPhaul was not given a chance to see if she could perform the nutritionist's duties with accommodations. But in order to work with Ms. McPhaul, Respondents transferred Ms. McPhaul to intake clerk in May 1995. McPhaul Depo. 111-112; App. 83a. A reasonable assumption can be made that if Ms. McPhaul could handle the nutritionist position for a year without accommodations before suffering fibromyalgia she could handle being an intake clerk, a lower position, without accommodations. McPhaul Depo. 62-63; App. 72a. But by the time of this transfer, Ms. McPhaul was experiencing the effects of the fibromyalgia. Around the time of her first performance evaluation as intake clerk, Ms. McPhaul explained her situation and asked for an accommodation. Whether Ms. McPhaul could perform the essential functions with an accommodation is unknown as Ms. McPhaul had two more performance evaluations without any attempted accommodations.

Again, the focus on the lack of restriction orders by a doctor is misplaced. Ms. McPhaul suffered fibromyalgia and sought ways to have it corrected. When she returned from the Mayo Clinic due to the need to return to work, the Mayo Clinic only gave its impression as to what Ms. McPhaul was suffering. Without further examinations and a complete diagnosis, Mayo Clinic could not provide Ms. McPhaul with

an appropriate treatment plan. When Dr. Hughes finally provided the diagnosis, work restrictions were useless as the Respondents had already terminated Ms. McPhaul. The diagnosis was February 1, 1996 and Ms. McPhaul was terminated January 22, 1996. McPhaul Depo. 49; App. 59a.

Therefore, Ms. McPhaul has shown that she was a qualified individual who could perform the essential functions of either position.

For the fourth element, discrimination occurs when the employer fails to make reasonable accommodations to known physical limitations of an employee, unless the accommodations would impose undue hardship on the employer or when the employer denies opportunities to an employee because of the need to make reasonable accommodations to the physical impairments of the employee. The employer is required to enter an interactive process with the employee to reach a reasonable accommodation. Bultemeyer, 100 F.3d at 1284-1286.

The interactive process probably should have started in May 1995. Respondents knew that Ms. McPhaul was having difficulties considering a year occurred without incident. At this point, Respondents should have allowed Ms. McPhaul to explain her difficulties and sought a reasonable solution. Instead, Ms. McPhaul's position was shifted. Despite the shift, Ms. McPhaul still had difficulties because of the fibromyalgia. When her first evaluation came as intake clerk, Ms. McPhaul explained her situation and proposed a solution. Now the interactive process definitely began and immediately stopped. Respondents turned down Ms. McPhaul's suggestion and did not provide a counter solution.

Ms. McPhaul's suggestion was not unreasonable. A reasonable accommodation includes modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position. 29 C.F.R. § 1630.2(o). Ms. McPhaul only suggested a change in schedule to allow her to arrive later or leave earlier. McPhaul Depo. 58, 62-63; App. 68a, 72a. Attributing her difficulties with fatigue and tiredness, Ms. McPhaul thought the extra rest would enhance her performance.

Ms. McPhaul's suggestion did not impose an undue hardship on the Respondents. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity. 29 C.F.R. § 1630.2(p). A factor to be considered is the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business. 29 C.F.R. § 1630.2(p)(2)(v). Ms. McPhaul's suggestion was already in operation for another employee for different reasons. Respondents turned down Ms. McPhaul's suggestion because another employee already had that schedule change. McPhaul Depo. 58-59; App. 68a-69a. That employee's schedule change was to accommodate the employee's schedule rather than any impairment. Because the Respondents were already engaged in the schedule change practice, no undue hardship would be incurred.

Therefore, Ms. McPhaul has shown that the Respondents failed to make reasonable accommodations towards Ms. McPhaul for her disability.

Ms. McPhaul has shown that she is disabled as she suffered an impairment which substantially interfered with her major life activities. The Respondents were aware of Ms. McPhaul's difficulties. Ms. McPhaul was a qualified individual who could perform the essential functions without reasonable accommodations, but was never given a chance to show she could with accommodations after the fibromyalgia surfaced. The Respondents failed to take any steps in an attempt to accommodate Ms. McPhaul. Based on the facts presented here, granting the summary judgment motion was inappropriate as genuine issues of material fact existed and Respondents were not entitled to judgment as a matter of law on the issue of Ms. McPhaul's ADA claim.

ARGUMENT 2

The plaintiff has shown that the reasons proffered by the respondents were pretextual to avoid an adverse summary judgment ruling.

The Fourteenth Amendment of the United States Constitution provided that no citizen of the United States shall be denied equal protection of the laws. When it comes to discrimination, 42 U.S.C. § 1983 provides the enforcement. Anybody acting under color of law who deprives a person any rights will be liable to that injured person. Here, Ms. McPhaul alleged that the Respondents discriminated against her because of her race.

Because direct evidence of discrimination might be lacking, discrimination may be shown through the use of the indirect method under the burden shifting test set forth in McDonnell Douglas. Under this test, the plaintiff must show: (1) he or she is a member of a protected class; (2) he or she

was performing according to his or her employer's legitimate expectations; (3) he or she was subjected to an adverse employment action; and (4) similarly situated employees received more favorable treatment. McDonnell Douglas, 93 S.Ct. at1824. Throughout the entire burden shifting test, the plaintiff retains the burden of showing that the defendant intentionally discriminated against him or her. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

For the first element, the facts are undisputed that Ms. McPhaul is of a protected class. She is an African American. Therefore, Ms. McPhaul has shown that she is of a protected class.

For the second element, Ms. McPhaul was performing according to her employer's legitimate expectations. When she first began with Respondents and until her encounter with cancer, Ms. McPhaul performed the nutritionist position without incident. When the fibromyalgia effects started, Ms. McPhaul's work performance suffered, but Respondents continued to retain Ms. McPhaul while Ms. McPhaul tried to determine the cause of her medical problems. The element does not require one to be a model employee, but one that meets the employer's expectations. Ms. McPhaul met those expectations until Respondents determined that Ms. McPhaul was "too sick to work."

Therefore, Ms. McPhaul has shown that she had performed according to Respondents' legitimate expectations.

For the third element, Ms. McPhaul must show that she was subjected to an adverse employment action. In this case, Ms. McPhaul suffered several adverse actions. Ms. McPhaul suffered a demotion from nutritionist to intake clerk,

lack of training in her new position as intake clerk, denial of a change in schedule, a heavier work load, dress code restrictions, the hostile environment, and subsequent termination.

For the last element, Ms. McPhaul must show that similarly situated employees received more favorable treatment. Ms. McPhaul was trained less in the position in comparison to a Caucasian co-worker, Ms. Shock. McPhaul Depo. 141-142; App. 87a. Ms. McPhaul requested a change in schedule in order to find a way to alleviate her medical problems yet this request was denied because Ms. Shock already had preferred treatment in varying her hours. McPhaul Depo.59, 63, 84-85; App. 68a-69a, 72a, 79a. Ms. McPhaul received a heavier work load that Ms. Shock. McPhaul Depo. 116, 124, 141; App. 85a-86a, 87a. Ms. McPhaul was specifically told not to wear a white uniform as the nurses, but to wear casual clothing. McPhaul Depo. 189-190; App. 101a-102a. Ms. Shock, however, was seen by Ms. McPhaul wearing the white clothing much like the nursing staff. McPhaul Depo. 189-190; App. 101a-102a. No other ethnic employees were subjected to derogatory racial terms like Ms. McPhaul was with Ms. Shock's statements. McPhaul Depo. 141, 142, 145; App. 87a, 88a, 90a.

By no means is the prima facie standard set. The prima facie case can be skipped if the defendant provides a reason. This prima facie framework is by no means rigid. U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). Once the non-discriminatory reason is articulated by the defendant, the prima facie framework becomes irrelevant. Hicks, 509 U.S. at 508. Even here, the District Court assumed a prima facie case was made and directed its attention beyond the prima facie stage to the reason and pretextual stages. By satisfying

all four elements and Respondents providing reasons, Ms. McPhaul has provided a prima facie case.

Once the elements of the prima facie case are established, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. McDonnell Douglas, 93 S.Ct. at 1824; Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Here, Respondents alleged that the transfer to intake clerk was due to poor performance as nutritionist; that Ms. McPhaul had been trained in her new position as intake clerk; no one had a change in schedule; Ms. McPhaul's work load was similar to other intake clerks; no one was punished for what they wore; the environment was not hostile; and Ms. McPhaul was subsequently terminated for her poor work performance.

If the defendants are able to provide reasons, the burden shifts back to the plaintiff to demonstrate that the proffered reasons are pretext for discrimination. McDonnell Douglas, 93 S.Ct. at 1826; Burdine, 101 U.S. at 249. Pretext may be shown by: (1) the defendant's explanation had no basis in fact; (2) the explanation was not the real reason; (3) the reason stated was insufficient to warrant the action; or (4) similarly situated individuals were treated differently. Lenoir v. Roll Coater, Inc. 13 F.3d 1130, 1133 (7th Cir. 1994); Essex v. United Parcel Service, 111 F.3d 1204, 1311 (7th Cir. 1997).

For the demotion, the explanation was insufficient to warrant the action and had no basis in fact. The demotion was alleged to allow Ms. McPhaul an easier task and provide less work. Respondents, however, were not consistent in their determinations after evaluations. Ms. McPhaul had one poor performance evaluation as a nutritionist. The immediate

solution was to demote Ms. McPhaul. No reason was provided as to why such a solution was necessary. But when Ms. McPhaul received poor evaluations as intake clerk, Ms. McPhaul was given chances to improve. Then while engaged in the task as intake clerk, the task was not easier because Ms. McPhaul did not receive all the necessary training. McPhaul Depo. 141-142; App. 87a. In addition, McPhaul received a higher work load, so less work was not involved. McPhaul Depo. 116, 124, 141; App. 85a-86a, 87a. Therefore, the demotion was not warranted and the reasons of ease and reduced work load had no basis in fact.

For the lack of training in her new position as intake clerk, McPhaul has already provided the argument that non-protected individuals were treated differently. Ms. Shock received full training. Meanwhile, Ms. McPhaul was forced to make due with the training that she had. McPhaul Depo. 114-142; App. 87a. Therefore, the reason of full training had no basis in fact.

For the denial of a change in schedule, the reason had no basis in fact and non-protected individuals were treated differently. Ms. Shock was allowed to alter her work schedule. McPhaul Depo. 85; App. 79a. Ms. McPhaul made a similar request and was denied because Ms. Shock already had the change in schedule. McPhaul Depo. 85; App. 79a. Ms. Shock was not required to provide a compelling reason why she could alter her schedule. Ms. Shock's reason could include making the bank before closing, picking up children, her own health reasons, or to get a jump on the weekend. Ms. McPhaul, however, asked for the reduction to increase her productivity since physicians could not determine the cause of Ms. McPhaul's medical problems and thereafter provide a treatment plan. McPhaul Depo. 85; App. 79a. The Court of Appeals reasoned that a change in schedule was on

a "first come - first serve" basis and that Ms. Shock varied her days. If such was the case, Ms. McPhaul should have been given the opportunity to ask for similar accommodating changes, but could not since she received the flat denial. Additionally, while Ms. McPhaul sought appropriate medical attention to her problems, she was instructed to return to work showing no consideration was directed to Ms. McPhaul like Ms. Shock. McPhaul Depo. 47, 48; App. 58a, 59a. Because someone else was allowed to alter their schedule to fit their needs, the reason had no basis in fact and non-protected individuals were treated differently.

For the heavier work load, the reason had no basis in fact. Ms. McPhaul noticed the difference in the amount of clients. Ms. Shock had less to do as exemplified by the evidence that she was able to alter her work schedule. McPhaul Depo. 85, 116, 124, 141; App. 79a, 85a-86a, 87a. Therefore, an equal work load had no basis in fact.

For the dress code, protected individuals received preferential treatment. Ms. McPhaul was told not to wear white to distinguish herself from the nursing staff. McPhaul Depo. 189-190; App. 101a-102a. Ms. Shock, in a similar position of intake clerk, wore white. McPhaul Depo. 189-190; App. 101a-102a. The work environment has previously been shown to lean towards Ms. Shock. Ms. Shock could alter her work schedule without problems and Ms. Shock could wear the clothes of her preference. The conditions of Ms. McPhaul's work were different.

The environment refers to the statements provided by Ms. Shock. Ms. Shock used a derogatory racial epithet weekly. McPhaul Depo. 141,142, 145; App. 87a, 88a, 90a. Ms. Shock would make it a point to point out and insert the epithet when used by the patients. McPhaul Depo. 141, 142,

145; App. 87a, 88a, 90a. Ms. McPhaul detailed out three incidents in which the term was used and its use was unnecessary. McPhaul Depo. 144, 149; App. 89a, 94a. Additionally, Ms. Shock attempted to focus her conversations around Ms. McPhaul with unnecessary race relations topics. McPhaul Depo. 143, 149-150; App. 88a, 94a-95a. No other ethnic employees had to hear racial epithets around them nor had to hear discussions about relations surrounding their race.

Lastly, the subsequent termination was not due to poor work performance. This reason had no basis in fact and was insufficient to warrant the termination. Respondents knew Ms. McPhaul was experiencing medical difficulties. While Ms. McPhaul was away seeking appropriate medical help, Respondents recalled Ms. McPhaul back to work. McPhaul Depo. 47, 48; App. 58a, 59a. When Ms. McPhaul returned to work, Respondents requested more information from the Mayo Clinic. McPhaul Depo. 161; App. 97a. Because Ms. McPhaul had to return to work, the Mayo Clinic was unable to give a definite diagnosis, but pointed in the possible direction of what was Ms. McPhaul's ailment. The termination was not warranted because Respondents were not willing to try to work with Ms. McPhaul on her ailment at any time and not willing to give her a chance to get an appropriate diagnosis and treatment plan. Similarly, the poor work performance was an excuse for Respondents to avoid working with Ms. McPhaul. Therefore, the reason had no basis in fact and the termination was unwarranted.

Ms. McPhaul provided a prima facie case and Respondents provided reasons which were alleged to be legitimate and non-discriminatory, so the burden shifted back to Ms. McPhaul to show that the reasons were pretextual. Ms. McPhaul has shown that the reasons were pretextual and the actions were motivated by racial animus. Based on the

facts presented here, granting the summary judgment was inappropriate as genuine issues of material fact existed and Respondents were not entitled to the judgment as a matter of law on the issue of Ms. McPhaul's Section 1983 claim.

ARGUMENT 3

A hostile work environment can be created through the use of racially insensitive terms and topics by a co-worker despite the fact that the terms and topics are not directed at someone who is in the racial class but can be heard by that person.

In order for a plaintiff to have an actionable hostile work environment claim, the work environment must be subjectively and objectively hostile. Harris v. Forklift Systems, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). An objective hostile environment is one that a reasonable person would find hostile or abusive. Harris, 114 S.Ct. at 370. A court must consider all the circumstances including: the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or was a mere offensive utterance, and whether it interferes with the employee's work performance. Harris, 114 S.Ct. at 371.

Here, Ms. McPhaul described the statements by a co-worker. These statements included using a racial epithet. Examples included the co-worker quoting patients using the term. McPhaul Depo. 141, 142, 145; App. 87a, 88a, 90a. The co-worker would question the racial background of patients including wondering about the heritage of a light skinned child who had a dark skinned mother. McPhaul Depo. 149; App. 94a. The co-worker quoted a patient who stated that the supervisor looked like a "little nigger lady" that

the patient used to work with in Florida. McPhaul Depo. 144; App. 89a. The co-worker would also address race relations topics such as an attack by the Klu Klux Klan and the O.J. Simpson trial. McPhaul Depo. 143, 149-150; App. 88a, 94a-95a.

Ms. McPhaul described the co-worker's statement as hostile. She stated that she became offended by the use of the racial epithet. McPhaul Depo. 142-143, 151; App. 88a, 95a-96a. She began to tire of hearing the co-worker's racial comments and topics. McPhaul Depo. 142-143, 151; App. 88a, 94a-95a. Therefore, the environment was subjectively hostile.

The co-worker's statements were also objectively hostile as a reasonable person would become offended and tire of hearing the comments. Ms. McPhaul described hearing the racial epithet at least once a week. McPhaul Depo. 151; App. 95a-96a. The co-worker made attempts to fit the epithet or race relations topics in her conversations. McPhaul Depo. 151; App. 95a-96a. Therefore, the circumstances point to the frequency. Although any terms might have been directed at Ms. McPhaul, the use of the term is severe. No one likes to hear someone else being "called out" if they also fit that description. For example, making fun of someone's weight problem in the presence of someone with a weight problem does affect the listener. The listener is reminded of his or her own difficulties and circumstances. Here, the use of the term "nigger" reminds the African American population of the treatment they, their parents, grandparents, or ancestors have endured in this country. For similar reasons, the epithet is humiliating. Here, its use was not a mere utterance as it was used frequently. The use interfered with Ms. McPhaul's work in that she lost respect for this co-worker and her

supervisor who refused to take steps to completely stop the co-worker's statements.

To show that Respondents acted intentionally, Ms. McPhaul still must show that Respondents acted or failed to act with a deliberate or reckless disregard of plaintiff's constitutional rights or the conduct causing the constitutional deprivation occurred at their direction or with their knowledge and consent. Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982). Ms. McPhaul made several complaints to her supervisor regarding the co-worker's statements. McPhaul Depo. 148-149, 152; App. 93a, 94a, 96a. Nothing was done. In fact, one incident was directed to the supervisor in which the co-worker stated that a patient claimed the supervisor looked like a "little nigger lady" in Florida. McPhaul Depo. 143; App. 89a. After this incident, Ms. McPhaul pointed out to the supervisor that this kind of comment is what she had previously complained about. McPhaul Depo. 143; App. 89a. Even after this, the comments still continued. McPhaul Depo. 148; App. 93a. The supervisor had knowledge that the comments were occurring from Ms. McPhaul's complaints and the one comment. The supervisor provided consent when she told Ms. McPhaul to ignore the comments. No disciplinary action was directed towards the co-worker. Therefore, Respondents intentionally discriminated against Ms. McPhaul.

Ms. McPhaul has shown that inappropriate comments were being made. The comments were subjectively offensive to Ms. McPhaul. The comments were objectively offensive because they were frequently made, severe in nature, humiliating, and undercut respect to people. Respondents discriminated because they knew the comments were happening and took no measures against them. Based on the facts presented here, granting the summary judgment was

inappropriate as genuine issues of material fact existed and Respondents were not entitled to judgment as a matter of law on the issue of Ms. McPhaul's claim of a hostile work environment.

CONCLUSION

On the Americans with Disabilities Claim, the Court of Appeals determined that Ms. McPhaul was not a qualified individual in order to establish her claim. The Court of Appeals did not address the issue of whether Ms. McPhaul was disabled. The evidence presented shows that Ms. McPhaul was disabled as she suffered a physiological disorder. The application of the term "qualified individual" needs further analysis to see if it includes one who suffers but does not yet have a diagnosis and treatment plan. Furthermore, an individual deserves the opportunity to show that the essential functions can be done with an accommodation even without a diagnosis.

On the discrimination claim, Ms. McPhaul has satisfied the burden shifting test by establishing a prima facie case. In any event, the prima facie requirement is not set in stone as the Respondents provided alleged legitimate, non-discriminatory reasons for their actions which can waive the prima facie requirement. Ms. McPhaul then satisfied her burden by showing that these reasons were pretextual. A finding that Ms. McPhaul has provided sufficient evidence to show disputed facts and that Respondents are not entitled to judgment as a matter of law is necessary to avoid future inaccurate rulings.

On the hostile work environment claim, a reasonable person can find racially insensitive statements or comments not directed to, but spoken so one can hear, as hostile. Such

comments are just as damaging if spoken by a co-worker and the supervisor does not act to prevent the comments from continuing. A finding of the objective nature of such comments and the lack of prevention needs to be done to avoid such conduct again.

The Petition for a Writ of Certiorari should be granted. Otherwise, this Court will suffer the misapplication of the terms "disabled" and "qualified individual" in ADA claims, future inaccurate rulings when a plaintiff shows that the reasons proffered were pretextual in racial discrimination claims, and continued hostile work environment in which undisciplined, frequent racially insensitive comments are made in the presence of listeners who fit the racial qualifications.

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed August 16, 2000]

No. 99-1092

CHERYL K. MCPHAUL,
Plaintiff-Appellant,

v.

BOARD OF COMMISSIONERS OF COUNTY, INDIANA, ARLEEN HORINE, in her official and individual capacity, and MADISON COUNTY BOARD OF HEALTH,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 97 C 97–Sarah Evans Barker, *Chief Judge*.

ARGUED February 18, 2000–DECIDED August 16, 2000

Before BAUER, POSNER, and MANION, Circuit Judges.

MANION, *Circuit Judge*. Cheryl McPhaul sued her former employer, the Madison County Board of Commissioners, alleging that the County failed to accommodate her disability in violation of the Americans with Disabilities Act (ADA). She also brought an individual capacity suit, under 42 U.S.C. § 1983, against her former supervisor, Arleen Horine, alleging that Horine discriminated against her because of her race, in violation of the Equal Protection Clause of the Fourteenth Amendment. The defendants moved for summary judgment. The district court granted the motion, concluding that McPhaul failed to establish a prima facie case for her ADA and section 1983 claims. McPhaul appeals, and we affirm.

I.

Cheryl McPhaul is a black woman who worked as a registered nurse for the Women, Infants and Children (WIC) program in Madison County, Indiana. WIC is a federally-funded program that provides health care and nutrition assistance for pregnant women, infants and children. McPhaul's supervisor was Arleen Horine, a registered nurse who coordinates the WIC program in Madison County.

McPhaul began working for WIC as a nurse nutritionist in April of 1994, where her responsibilities included counseling WIC clients about nutrition and certifying them for program benefits like food supplements. In May 1995, Horine concluded that McPhaul's performance as a nutritionist was deficient because she was writing the same

information on the charts of WIC clients regardless of their varying situations, including the infants, a practice that Horine described as "totally inappropriate." Thus, Horine transferred McPhaul to the position of intake clerk in May 1995. Intake clerks certify clients for the WIC program in order to secure federal funding. They record the heights and weights of clients so that the nurse nutritionists can properly advise clients about their diets. As an intake clerk, McPhaul continued to receive the same benefits and pay that she received as a nutritionist.

In September 1995, McPhaul received her first performance evaluation as an intake clerk, in which Horine rated her performance "Below Average, " the second lowest rating on a scale of five. Horine's evaluation states that McPhaul was having "great difficulty in doing her job," that she was making "gross errors" in charting the heights and weights of clients, and that she was having trouble remembering shot schedules for infants and children and how to certify clients. Although McPhaul was retrained after her initial evaluation, she fared no better on her second evaluation in November 1995. According to Horine's notes, McPhaul's performance was still "Below Average" because she continued to make "gross errors" in plotting the heights and weights of clients, and was still unable to understand the certification process. In January 1996, Horine completed McPhaul's third (and last) performance review, in which McPhaul received the lowest possible rating of "Unsatisfactory." Horine stated that McPhaul was making "numerous errors" in the routine tasks of the job, and that she was still failing to accurately record the heights, weights, and even the ages of clients. Horine recommended to the WIC administrator that McPhaul should be discharged. The administrator and the Health Officer

approved Horine's recommendation, and McPhaul was terminated on January 22, 1996.

After her termination, McPhaul sued the Board of Commissioners, alleging that she was disabled and that the Board failed to accommodate her disability, in violation of the ADA. She also sued Horine in her individual capacity, under section 1983, alleging that Horine discriminated against her because of her race, thus affecting the terms and conditions of her employment. McPhaul also claimed that Horine failed to protect her from an alleged campaign of racial harassment by her white co-worker, Marcia Shock.

Concerning her ADA action, McPhaul claims that she had been suffering from fibromyalgia since February 1995 (before Horine transferred her from the nutritionist position to the intake clerk position in May 1995). Fibromyalgia is a disease that is similar to chronic fatigue syndrome; its cause is unknown, there is no cure, and the symptoms are entirely subjective and usually involve chronic pain and fatigue. McPhaul's fibromyalgia symptoms included fatigue, insomnia, shortness of breath and muscle pain, including sore hands and joints. She claims that her condition made it difficult for her to concentrate, bathe, walk, write and work, and that in September 1995 she requested Horine to accommodate her alleged disability by allowing her to arrive at work one hour later or to leave one hour earlier, or both. According to McPhaul, her request was denied. Horine claims that McPhaul never made the request.

On January 11, 1996, McPhaul saw Dr. Van Dellen at the Mayo Clinic. He concluded that it was "possible" that McPhaul had fibromyalgia, and he gave her a card that

instructed her to participate in an education program about the disease. McPhaul allegedly presented the card to Horine, but Horine asserts that she was never informed of McPhaul's disease. McPhaul was not diagnosed with fibromyalgia until February 1, 1996, several days after she was terminated.

McPhaul's disparate treatment claim under section 1983 is based on several allegations that Horine discriminated against her because of her race by demoting her to the intake clerk position, terminating her from that position, and by treating her differently in regards to other terms and conditions of her employment. Horine disputes these allegations.

In support of her hostile environment claim under section 1983, McPhaul alleges that she was harassed by Shock's discussion of racially sensitive subjects and her repeated use of the word "nigger" in McPhaul's presence. McPhaul also alleges that Horine knew about and tolerated Shock's conduct, and is thus liable in her individual capacity. Horine disputes these allegations as well.

The defendants moved for summary judgment, arguing that McPhaul failed to establish a prima facie case to support her claim under the ADA, or to support her disparate treatment and hostile environment claims under section 1983. The district court granted the motion, concluding that McPhaul's ADA claim failed because she did not present sufficient evidence that she was disabled; that her disparate treatment claim failed because she presented no evidence that Horine was motivated by discriminatory intent; and that her hostile environment claim failed because she produced no

evidence that her work environment was objectively hostile, or that Horine knew or consented to Shock's conduct.

"We review the district court's entry of summary judgment *de novo*," *Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997, 1003 (7th Cir. 2000), and we will view all of the facts and draw all reasonable inferences in favor of the nonmoving party. *See id.* Summary judgment is proper if the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). McPhaul cannot merely allege the existence of a factual dispute to defeat summary judgment. *Skorup v. Modern Door Corp.*, 153 F.3d 512, 514 (7th Cir. 1998). She must supply evidence sufficient to allow a jury to render a verdict in her favor. *Ross v. Indiana State Teacher's Association*, 159 F.3d 1001, 1012 (7th Cir. 1998).

II.

A. The ADA Claim

McPhaul's first argument on appeal is that the district court erred in concluding that her reasonable accommodation claim fails because she was not disabled under the ADA. The ADA proscribes discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, . . . and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). The Act also provides that an employer discriminates against a qualified individual with a disability by "not making reasonable accommodations to the known physical or mental

limitations of an otherwise qualified individual with a disability . . . ." 42 U.S.C. § 12112(b)(5)(A). To establish a prima facie case for failure to accommodate under the ADA, McPhaul must show that: (1) she was disabled; (2) the Board was aware of her disability; and (3) she was a qualified individual who, with or without reasonable accommodation, could perform the essential functions of the employment position. *Feldman v. American Memorial Life Ins. Co.*, 196 F.3d 783, 789 (7th Cir. 1999). Although the district court held that McPhaul failed to establish that she was disabled, we reserve opinion on that determination because we find it dispositive that McPhaul has failed to present sufficient evidence to show that she was a "qualified individual" under the ADA. *See id.*

A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). McPhaul has the burden of proof on this issue, as she must show that she could perform the essential functions of the nutritionist and intake clerk jobs either with or without a reasonable accommodation. *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1284 (7th Cir. 1996); 29 C.F.R. § 1630.2(m).

The evidence clearly demonstrates that McPhaul was not able to perform the essential functions of the nutritionist and intake clerk positions. Horine concluded that McPhaul's performance as a nutritionist was deficient because she was recording the same information on the charts of all of her patients, regardless of the various facts each presented, including the infants. For obvious reasons, Horine described

this practice as "totally inappropriate." McPhaul does not dispute Horine's conclusion. Moreover, McPhaul does not dispute Horine's three evaluations that thoroughly documented McPhaul's performance deficiencies as an intake clerk.[1] And McPhaul presents no medical evidence to show that her performance deficiencies at either job were due to her alleged disability of fibromyalgia.

McPhaul responds by claiming that she would have been able to perform the essential functions of the nutritionist and intake clerk jobs if Horine accommodated her request to arrive at work one hour later, or to leave one hour earlier. Aside from the fact that Horine claims that McPhaul never requested reduced hours, McPhaul provides no medical evidence to support her claim that her requested accommodation would have improved her performance, as none of her physicians ever recommended any work restrictions or accommodations due to her condition.[2] All that McPhaul can present in support of her reasonable accommodation claim is her own self-serving testimony, and

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[1] While McPhaul does not dispute her performance evaluations directly, she does claim that Horine failed to sufficiently train her for the intake clerk position, and required her to see more clients than other intake clerks. But as we explain in our analysis of McPhaul's disparate treatment claim, she fails to present any evidence to support these allegations, and the record actually discredits them.

[2] The record does contain, however, a January 17, 1996 note from Dr. Van Dellen of the Mayo Clinic that simply states that McPhaul "could return to work January 15, 1996." There is no indication of any work restrictions or of any need for a work accommodation.

in this case, that is just not sufficient for a reasonable jury to find that she is a qualified individual with a disability under the ADA. *See Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1295 ("Self-serving affidavits without factual support in the record will not defeat a motion for summary judgment."). Therefore, McPhaul's ADA claim fails.

B. The Section 1983 Claims

McPhaul also argues that Horine is personally liable for discriminating against her because of her race, in violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. According to McPhaul, Horine treated her differently regarding the terms and conditions of her employment, and failed to act to stop Shock's alleged campaign of racial harassment.

To state a prima facie case under the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must demonstrate that she: (1) is a member of a protected class; (2) is otherwise similarly situated to members of the unprotected class; (3) suffered an adverse employment action; (4) was treated differently from members of the unprotected class; and (5) the defendant acted with discriminatory intent. *Greer v. Amesqua*, 212 F.3d 358, 370 (7th Cir. 2000); *Jackson v. City of Columbus*, 194 F.3d 737, 751-52 (6th Cir. 1999). Regarding the fifth element, McPhaul must show that Horine "acted [or failed to act] with a nefarious discriminatory purpose," and discriminated against McPhaul because of her membership in a definable class (because she is black). *Nabozny v. Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996) (internal citations omitted).

1. Disparate treatment.

McPhaul first contends that Horine discriminated against her because of her race by treating her differently in regards to the terms and conditions of her employment by: (1) transferring her to the intake clerk position; (2) terminating her from that position; (3) neglecting to train her for the intake clerk position while Shock, a white intake clerk, received more sufficient training; (4) denying her request to work reduced hours while granting Shock's request for the same accommodation; (5) requiring her to see more clients than Shock; and (6) prohibiting her from wearing a nurse's uniform while allowing Shock to wear one.

McPhaul's claims regarding her transfer and termination clearly fail because she does not establish the second and fifth elements of a prima facie case. She does not establish the second element--that she was otherwise similarly situated to other nutritionists or intake clerks who are members of an unprotected class--because she does not identify any co-worker with a similar "Below Average" or "Unsatisfactory" performance rating.[3] *See O'Connor v. Chicago Transit Authority,* 985 F.2d 1362, 1371 (7th Cir. 1993) ("To make a prima facie case, O'Connor would have to

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[3] McPhaul only identifies Marcia Shock, a white intake clerk, as a member of an unprotected class who was allegedly treated more favorably by Horine. But Shock was not similarly situated to McPhaul because Horine rated Shock's performance as "Average," which is a superior rating to McPhaul's "Below Average" and "Unsatisfactory" ratings. McPhaul does not challenge Horine's performance evaluations. Also, at the time of her discharge, McPhaul was paid over $14.00 per hour while Shock was paid $11.00 per hour.

show that another grossly insubordinate worker was treated better than him.") (citation omitted). And because McPhaul presents no evidence to indicate that Horine's transfer and termination decisions were motivated by any reason other than McPhaul's performance deficiencies (which are undisputed), she clearly fails to show that Horine's decisions were motivated by racial animus. *Nabozny*, 92 F.3d at 453.

On her claim about inadequate training, McPhaul essentially argues that Horine set her up for failure by neglecting to prepare her for the intake clerk position while Horine ensured that Shock was well prepared before she started the job. Horine disputes McPhaul's claim, and the record contains no evidence that Shock received better (or more timely) preparation for the position. *See Slowiak*, 987 F.2d at 1295. Moreover, McPhaul does not dispute Horine's notes that McPhaul was "retrained fully for the job" after her first evaluation, but her performance still deteriorated to the "Unsatisfactory" level. Because the record discredits McPhaul's argument, and she presents no evidence that Horine acted with racial animus, this claim fails.

McPhaul's next contention is that Horine discriminated against her when she allegedly denied her request to work a reduced schedule, but granted Shock's request for the same accommodation. According to McPhaul, Horine's reason for denying her request was that she already reduced hours for Shock and could not grant the same favor to McPhaul.[4] But

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[4] Horine claims that neither McPhaul nor Shock made such a request, and thus no such accommodation was granted at all. We note that even if Horine did grant Shock's request on a first come, first served basis, that would be a legitimate business decision that is beyond our purview. *See McCoy v. WGN Continental*

McPhaul's actual testimony was that Shock's time away from work "varied," and not that she was regularly allowed to work a reduced schedule, which corroborates Horine's testimony that Shock never requested a reduced schedule, but occasionally took sick leave and vacation days. McPhaul presents no evidence to dispute that Shock used her accrued sick or vacation time when Horine allowed her to take a portion of a day off. And the record demonstrates that by January 1996, McPhaul had used all of her vacation and sick time. Nevertheless, Horine's decision to allow Shock to take accrued leave, and not to allow McPhaul to take leave that had not been accrued, does not evince that Horine was motivated by a "nefarious discriminatory purpose," and this claim fails.[5]

McPhaul also contends that Horine required her to see more WIC clients than Shock on a daily basis. In support of her contention, McPhaul relies solely on her own observations through a window to Shock's office, and fails to challenge the scheduling book in the record that demonstrates that the WIC receptionist distributed WIC clients equally to McPhaul and Shock. Thus, McPhaul provides no evidence that Horine intentionally assigned more clients to McPhaul, or did so because of her race.

Broadcasting Co., 957 F.2d 368, 373 (7th Cir. 1992) (this court does not sit as a super personnel department to review an employer's business decisions).

[5] And we have already established that McPhaul provided no medical evidence to support her request for a reduced schedule, and thus Horine had no compelling reason to grant it.

McPhaul's last claimed instance of disparate treatment is that Horine prohibited her from wearing a nursing uniform while she allowed Shock to wear one. According to McPhaul, Horine told her not to wear a uniform because WIC clients feel more comfortable when WIC staff are dressed in casual clothes. McPhaul does not indicate that she requested to wear a uniform, or that she was ever punished for wearing a uniform, or that she ever asked why Shock was apparently allowed to wear a uniform. The uniform was not a factor in her transfer or her termination, and there is no evidence that the uniform was an important issue at WIC. McPhaul just does not show that Horine's policy on uniforms was an adverse employment action. *See Southard v. Texas Bd. of Criminal Justice,* 114 F.3d 539, 555 (5th Cir. 1997) ("Not every negative employment decision or event is an adverse employment action that can give rise to a discrimination or retaliation cause of action under section 1983."); *see also Silk v. City of Chicago,* 194 F.3d 788, 800 (7th Cir. 1999). McPhaul also provides no evidence that Horine's policy was motivated by racial animus.

We conclude that McPhaul's claimed instances of discrimination (considered individually and collectively) do not constitute sufficient evidence for a reasonable jury to conclude that Horine discriminated against her because of her race. Thus, McPhaul's disparate treatment claim fails.

2. Hostile environment.

McPhaul also contends that Horine is personally liable for failing to act to stop Shock's alleged campaign of racial harassment. McPhaul does not allege any harassment by Horine, but that Shock, her co-worker, harassed her by making racially sensitive and derogatory remarks in her

presence while Horine failed to intervene to rectify the situation.

To establish an individual capacity claim under section 1983 against a supervisory official, there must be a showing that the official was directly responsible for the improper conduct, *Wolf-Lillie v. Sonquist,* 699 F.2d 864, 869 (7th Cir. 1983), and "knowingly, willfully, or at least recklessly caused the alleged deprivation by [her] action or failure to act." *Rascon v. Hardiman,* 803 F.2d 269, 274 (7th Cir. 1986). However:

> [A] defendant's direct participation in the deprivation is not required. An official satisfies the personal responsibility requirement of section 1983 if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent.

Id. (quoting *Smith v. Rowe,* 761 F.2d 360, 369 (7th Cir. 1985)). The plaintiff must also show that the supervisor acted (or failed to act) because of the plaintiff's race. *See Nabozny,* 92 F.3d at 453.

To prevail on a hostile environment racial harassment claim, the plaintiff must also show that her work environment

was both subjectively and objectively hostile.[6] *See Adusumilli v. City of Chicago,* 164 F.3d 353, 361 (7th Cir. 1998) (citing *Harris v. Forklift Systems*, 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)).

> An objectively hostile environment is one that a reasonable person would find hostile or abusive. [*Harris,* 510 U.S. at 21]. In determining whether a plaintiff has met this standard, courts must consider all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating; or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." [*Id.* at 23].

Adusumilli, 164 F.3d at 361. We shall evaluate McPhaul's claims according to these standards.

McPhaul alleges that Shock harassed her by discussing racially sensitive subjects and by repeatedly using the racial epithet "nigger" in McPhaul's presence. Although McPhaul alleges that Shock's comments occurred on a weekly basis, she presents three specific instances on appeal. In the first instance, Shock repeated to McPhaul a comment (made to Shock by a WIC client) that Horine looked like "a little nigger

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[6] Because section 1983 claims generally follow "the contours of Title VII claims," we will apply the same "hostile environment" standard that is applied in Title VII cases. *King v. Board of Regents of University of Wisconsin System,* 898 F.2d 533, 537 (7th Cir. 1990).

lady." The second instance involved Shock calling McPhaul's attention to the fact that a client was a dark-skinned mother who had a lighter-skinned baby. And lastly, Shock told McPhaul that Shock's family was once harassed by the Ku Klux Klan. According to McPhaul, she complained to Horine about Shock's derogatory and racially insensitive remarks, and that Horine advised her to "ignore it." But McPhaul also admitted that Horine later separated her from Shock by moving her to her own office. Horine testified that McPhaul never complained to her about Shock's alleged harassment, and that she never witnessed Shock using the word "nigger."

We first consider whether Shock's remarks created an objectively hostile environment for McPhaul. Shock allegedly used the word "nigger" when she repeated a comment made by a WIC client about Horine,[7] and thus Shock did not direct that epithet at McPhaul or anyone else. When such harassment is directed at someone other than the plaintiff, the "impact of [such] 'second hand harassment' is obviously not as great as the impact of harassment directed at the plaintiff." *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1144 (7th Cir. 1997). Although McPhaul also alleges that Shock used the word "nigger" on a weekly basis, she never claims that Shock directed it at McPhaul or anyone else, which indicates that Shock tended to repeat the epithet out of her own immaturity and insensitivity, rather than racial animus. Moreover, McPhaul stated twice in her deposition that she considered Shock's remarks (especially her use of the word "nigger") to be "offensive," but she never claimed that they interfered with her work performance, or were physically threatening or humiliating. Thus, the "mere utterance of an . . . epithet

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[7] Horine is white.

which engenders offensive feelings in an employee" is not sufficient to establish a hostile working environment. *Harris,* 510 U.S. at 21 (quoting *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1985)).

Shock's comment about the child's skin color was understandably offensive to McPhaul, but it was not about McPhaul, and merely demonstrates Shock's ignorance of the probable consequences of her careless chatter rather than racial hostility. And Shock's claim that the Ku Klux Klan once harassed her family does not implicate any hostile intent. We conclude, therefore, that McPhaul fails to present sufficient evidence to support a reasonable inference that Shock's remarks created an objectively hostile working environment. *See Adusumilli,* 164 F.3d at 361.

Moreover, there is insufficient evidence to indicate that Horine deliberately or recklessly intended or allowed Shock's alleged conduct, or that Horine failed to act because she was motivated by racial animus against McPhaul. The record does not indicate that Horine intended or directed any of Shock's comments, as they appear to have involved Shock's spontaneous (and inconsiderate) reactions to what she had observed or heard. And McPhaul admits that Shock's comments decreased after Horine gave McPhaul her own office. Therefore, McPhaul presents insufficient evidence to indicate that Horine was responsible for Shock's alleged

campaign of harassment, and the hostile environment claim fails.[8]

We conclude that McPhaul has failed to establish a prima facie case under the ADA because she is not a qualified individual with a disability. She has also failed to establish a prima facie case under section 1983 because she has not made a sufficient showing that Horine discriminated against her because of her race. Accordingly, We AFFIRM the district court.

A true Copy:

Teste:

/s/_____
Clerk of the United States Court of Appeals for the Seventh Circuit

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[8] McPhaul also argues that we must consider Horine's alleged failure to protect her from Shock's offensive remarks as further evidence of McPhaul's disparate treatment claim. Because we conclude that no reasonable jury could find that Shock's remarks created an objectively hostile environment, or that Horine was somehow motivated by racial animus to endorse them, our consideration of these allegations (individually, and collectively with the other six alleged instances of disparate treatment) does not change our conclusion that McPhaul's disparate treatment claim fails.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[Filed December 11, 1998]

No. IP 97-0097-C-B/S

CHERYL K. McPHAUL,
Plaintiff,

vs.

MADISON COUNTY BOARD OF HEALTH, BOARD OF COMMISSIONERS OF MADISON COUNTY and ARLENE HORINE, in her official and individual capacity,
Defendants.

JUDGMENT

In accordance with the Court's entry dated December J0, 1998, judgment is hereby entered in favor of Defendants Arlene Horine and the Board of Commissioners of Madison County on all of Plaintiff's claims. Plaintiff's claims as to

Defendant Madison County Board of Health are dismissed with prejudice.

It is so ORDERED this 11th day of December 1998.

/s/_____
SARAH EVANS BARKER, CHIEF JUDGE
United States District Court
Southern District of Indiana

District Court Judgment & Entry - 12/11/98

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[Filed December 11,1998]

No. IP 97-0097-C-B/S

CHERYL K. McPHAUL,
Plaintiff,

vs.

MADISON COUNTY BOARD OF HEALTH, BOARD OF COMMISSIONERS OF MADISON COUNTY and ARLENE HORINE, in her official and individual capacity,
Defendants.

ENTRY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on the motion for summary judgment by Defendants, Board of Commissioners of Madisofi County ("the County") and Arlene Horine ("Horine"), as to Plaintiff's claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (the "ADA"), the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. These

defendants assert that (1) Plaintiff cannot establish that she was a qualified individual suffering from a disability under the ADA; (2) Plaintiff cannot show that Defendants intentionally discriminated against Plaintiff on the basis of race; (3) Defendant Horine is entitled to qualified immunity; (4) Plaintiff cannot assert a claim for retaliation under Title VII of the Civil Rights Act of 1964, 17 U.S.C. § 2000e et seq. ("Title VII), the ADA or the Equal Protection Clause and (5) the County is not liable under § 1983 because Plaintiff has not alleged the violation of her constitutional rights through a municipal policy or custom or the act of an individual with formal policymaking authority. For the reasons set forth in the Court's discussion below, we grant summary judgment in favor of Defendants Horine and the County and dismiss with prejudice Plaintiff's claims against Defendant, Madison County Board of Health.

BACKGROUND

Plaintiff, Cheryl K. McPhaul ("McPhaul"), is a registered nurse who was formerly employed by Women, Infants and Children ("WIC") in Madison County, Indiana, a federally-funded program that provides health care assistance and food assistance for pregnant women, infants and children. See Defs. Exh. 2, Horine Aff. ¶ 3. The State of Indiana contracts with the Madison County Board of Health to administer the WIC program in Madison County. See Horine Aff. ¶ 3. Defendant Horine is the coordinator of the WIC program in Madison County and held this position during the time MePhaul was employed by WIC. See Horine Aff. ¶ 2. McPhaul began working at WIC as a Nurse Nutritionist on April 4, 1994. See Horine Aff. ¶ 4; Defs. Exh. 7, McPhaul Dep. at 43. In May 1995, McPhaul was reassigned by Horine,

her supervisor, to the position of Intake Clerk. See Horine Aff. ¶ 4; McPhaul Dep. at 115-116.

During the fall of 1995 through January 1996, McPhaul consulted several medical professionals, including the Mayo Clinic in Rochester, Minnesota, for various physical complaints. See McPhaul Dep. at *56-57*, 46-48, 89-90. On January 22, 1996, Horine terminated McPhaul's employment with WIC. See McPhaul Dep. at 172. McPhaul brought the present action, asserting that Defendants failed to accommodate her alleged disabilities so as to allow her to continue working and retaliated against her for filing a complaint with the Equal Employment Opportunity Commission (the "EEOC") by providing negative references to McPhaul's potential future employers. Further, McPhaul claims under the Equal Protection Clause and § 1983 that Defendants discriminated against her on the basis of race by demoting her from Nurse Nutritionist to Intake Clerk, refusing her request to reduce the number of hours she worked and creating a hostile work environment.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists if there is sufficient evidence for a jury to return a verdict in favor of the nonmoving party on the particular issue. See Anderson v. Liberty. Lobby. Inc., 477 U.S. 242, 248, 106

S.Ct. 2505, 2510 (1986); Methodist Med. Center v. American Med. Sec. Inc., 38 F.3d 316, 319 (7th Cir. 1994). A disputed fact is material only if it might affect the outcome of the suit in light of the substantive law. See Anderson, 477 U.S. at 248, 106 S.Ct. at 2510; Greenslade v. Chicago Sun-Times, Inc., 112 F.3d 853, 857 (7th Cir. 1997). In considering a summary judgment motion, a court must draw all justifiable inferences in a light most favorable to the opposing party and must resolve any doubt against the moving party. See Anderson 477 U.S. at 255, 106 S.Ct. at 2513; Spraying Sys. Co. v. Delavan, Inc., 975 F.2d 387, 392 (7th Cir. 1992).

While the burden rests squarely on the party moving for summary judgment to show "that there is an absence of evidence to support the nonmoving party's case," Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, *2553* (1986), the nonmoving party may not simply rest on the pleadings, but must affirmatively demonstrate by specific factual allegations that a genuine issue of material fact exists for trial. See Celotex, 477 U.S. at 322-23, 106 S.Ct. at 2552-53; Billups v. Methodist Hosp. of Chicago, 922 F.2d 1300, 1302 (7th Cir. 1991). Conclusory allegations by a party opposing a motion for summary judgment cannot defeat the motion. See Smith v. Shawnee Library System, 60 F.3d 317, 320 (7th Cir. 1995). "The moving party is 'entitled to a judgment as a matter of law' [if] the nonmoving party has failed to make sufficient showing on an essential element of her case with respect to which she has the burden of proof." Celotex, 477 U.S. at 323, 106 S.Ct. at 2253. However, if doubts remain as to the existence of a material fact, those doubts should be resolved in favor of the nonmoving party and summary judgment denied. See Wolf v. City of Fitchburg, 870 F.2d 1327, 1330 (7th Cir. 1989).

DISCUSSION

Defendants Horine and the County move for summary judgment, asserting that (1) McPhaul is not a qualified individual with a disability under the ADA and that Defendants did not fail to reasonably accommodate her; (2) McPhaul cannot show that Defendants terminated her on the basis of race or created a hostile work environment; (3) Horine is entitled to qualified immunity because McPhaul cannot show that Horine intentionally discriminated against her on the basis of race; (4) McPhaul cannot show the existence of a municipal policy, custom or action of person with final policymaking authority and (5) McPhaul cannot state a claim for retaliation under Title VII, the ADA or the Equal Protection Clause.

Plaintiff's ADA Claims

McPhaul's complaint states that she was diagnosed with colon cancer in January 1995 and underwent surgery for the cancer on February 23, 1995, returning to work on March 28, 1995, approximately one month before she was transferred to the position of Intake Clerk. See Compl. ¶ 11. She asserts that after her surgery, "she continued to feel ill and inordinately tired. McPhaul's physicians were unable to determine the cause for this." Compl. ¶ 15. McPhaul alleges that on September 15, 1995, she told Horine that she "was feeling extremely tired and asked Horine if she could work a reduced number of hours. Horine responded by telling McPhaul that she could not reduce the number of hours McPhaul worked because she had already reduced [Marcia] Shock's hours on her request." Compl. ¶ 16. McPhaul alleges that she visited the Mayo Clinic January 9-12, 1996 and was

diagnosed with asthma, bacterial endocarditis and fibromyalgia. See Compl. ¶ 18. McPhaul asserts that she was required to provide Horine with a detailed statement from the Mayo Clinic regarding her diagnosis before she was permitted to return to work on January 18, 1996. See Compl. ¶19. McPhaul was terminated on January 22, 1996, "allegedly for job performance deficiencies." Compl. ¶ 20.

McPhaul contends that Defendants failed to reasonably accommodate her disability in violation of the ADA. See Compl. ¶ 37.[9] McPhaul argues that she informed Horine of her disability but Horine failed to engage in the required "interactive process to determine the appropriate accommodations for McPhaul." Plaint. Resp. Br. at 16. In order to prove her claim that Defendants failed to reasonably accommodate her disability, McPhaul must show that (1) she was disabled within the meaning of the ADA, (2) her employer knew of her disability, (3) she was "an otherwise qualified individual" who could satisfy the essential requirements of her job with or without reasonable accommodation and (4) her employer failed to take reasonable steps to accommodate her disability. See Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1284-1285 (7th Cir. 1996).

Defendants move for summary judgment, arguing that McPhaul is not disabled within the meaning of the ADA. The ADA defines disability as "(1) a physical or mental impairment that substantially limits one or more of the major

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[9] McPhaul has abandoned her claims that Defendants discriminated against her on the basis of her disability. See Plaint. Resp. Br. at 9.

life activities; (2) a record of such impairment; or (3) being regarded as having such an impairment." 42 U.S.C. § 12102(2). "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(I). In determining whether an impairment is substantially limiting, a court should consider: "(1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long-term impact, or the expected permanent or long-term impact of, or resulting from, the impairment." See Hamm v. Runyon, 51 F.3d 721, 725 (7th Cir. 1995) (quoting 29 C.F.R. § 1630.20)).

McPhaul appears to claim cancer, asthma, bacterial endocarditis and fibromyalgia as her alleged disability or disabilities under the ADA. See Compl. ¶¶ 11, 15, 18. McPhaul argues that she has shown she had a disability because she "testified during her deposition that during most of 1995 as well as in early 1996, prior to her termination, she was suffering from fatigue, insomnia, muscle pain, and shortness of breath. She further testified that these symptoms interfered with her major life activities of working and taking care of herself because it was difficult to write and concentrate, her legs and hands were constantly sore, and she was constantly worried about her condition." Plaint. Resp. Br. at 10. We assume that McPhaul contends that the symptoms listed above are connected to the medical conditions she lists as disabilities in her complaint, though she does not explicitly argue this. Defendants attack these claimed disabilities on the grounds that McPhaul did not suffer from such alleged conditions or that the alleged conditions did not substantially interfere with the major life function of working.

First, Defendants contend that McPhaul was not disabled within the meaning of the ADA because of cancer during the relevant time period. Defendants argue that at the time McPhaul allegedly requested to work reduced hours, September 1995, McPhaul no longer suffered from cancer and so could not have been disabled because of cancer. McPhaul concedes in her deposition that she had undergone successful colon cancer surgery to remove the cancer and that she received no medical diagnosis of cancer subsequent to the surgery, although undergoing some additional testing. See McPhaul Dep. at 82-84. In addition, McPhaul has produced no evidence reasonably suggesting that she continued to suffer from cancer after her surgery, specifically, during the time period she requested reduced hours. Thus, we conclude that McPhaul has not created a genuine dispute that she was disabled on account of cancer.

Second, Defendants contend that McPhaul was not disabled within the meaning of the ADA because of asthma. The records from McPhaul's medical evaluation at the Mayo Clinic include a statement from Dr. R. G. Van Dellen:

> Ms. McPhaul has symptoms consistent with vasomotor rhinitis . . . . She has been having some pulmonary symptoms with shortness of breath and a suffocating feeling. Pulmonary function tests were normal, but a methacholine challenge resulted in a 21% drop in her FEV1 consistent with asthma (enclosed). The methacholine reproduced some, but not all, of her chest symptoms. She indicated the chest symptoms were more severe at times than following the methacholine challenge. I was

> uncertain whether her chest symptoms represent asthma, but that is clearly possible. I advised:
>
> 1. That she monitor her breathing with a peak flow meter.
> 2. Maxair, 2 puffs as needed, up to four times daily.
> 3. Beclovent, 4 puffs twice daily, on a regular basis.
> 4. An annual influenza immunization.
>
> She should have her asthma evaluated periodically with spirometry. A chest x-ray was negative.

Defs. Exh. 3 (emphasis added). Defendants argue that, even if Dr. Van Dellen's cautious words can be construed as a diagnosis of asthma, he nowhere places restrictions upon McPhaul because of her asthma, particularly upon her work duties, so as to indicate that McPhaul was disabled because of her asthma within the meaning of the ADA. In her deposition, McPhaul concedes that neither Dr. Van Dellen nor any other physician recommended that "[her] work conditions require[d] special attention because of [her] asthma." McPhaul Dep. at 77. Further, McPhaul presents no evidence supporting her argument that her asthma substantially limited her work activities. Even in her deposition, McPhaul cannot identify specific circumstances in which her asthma interfered with her work, though she. asserts that "it could have" and that she "think[s] it would interfere with that" and that she is "sure that there were instances that it did." McPhaul Dep. at 76-77. She describes episodes in which she experienced "shortness of

breath or a suffocating feeling" that made her "scared" and "frightened" whose duration "might only last a few minutes." McPhaul Dep. at 76-77. McPhaul presents no further evidence in her response brief, and we find that the evidence recounted above does not provide a sufficient basis for a reasonable fact finder to conclude that McPhaul was disabled within, the meaning of the ADA on account of her asthma.

Third, Defendants challenge McPhaul's asserted disability of bacterial endocarditis. McPhaul states in her complaint that the Mayo Clinic diagnosed her with bacterial endocarditis. See Compl. ¶ 18. However, Defendants contend that there was no such diagnosis, but rather that McPhaul merely received a card from the Mayo Clinic upon her discharge providing a warning for purposes of dental procedures and surgery of the upper respiratory tract, which card stated that McPhaul "needs protection from bacterial endocarditis because of an existing heart condition." Defs. Exh. 5. The card provides a diagnosis of"mitral regurg" (see Defs. Exh. 5) or mitral regurgitation, which means "the backflow of blood from the left ventricle into the left atrium, owing to inadequate functioning (insufficiency) of the mitral valve." Dorland's Illustrated Medical Dictionary 1445 (27th ed. 1988). In fact, McPhaul concedes in her deposition that she did not receive a diagnosis of bacterial endocarditis. See McPhaul Dep. at 66. Thus, we conclude that McPhaul cannot show that she was disabled under the ADA on account of bacterial endocarditis.

Fourth, Defedants assert that McPhaul was not disabled by fibromyalgia. Defendants argue initially that McPhaul has not shown that she had the condition during the relevant time period because she was not diagnosed with

fibromyalgia until February 1, 1996, by Dr. Gordon Hughes (see Defs. Exh. 11), almost two weeks after she was discharged from WIC and several months after McPhaul allegedly requested reduced work hours. The earliest possible diagnosis was January 18, 1996, when Dr. Van Dellen noted in his report that "it is quite possible that she has fibromyalgia" (see Defs. Exh. 3) and gave McPhaul a card referring her to a Patient Education Program for fibromyalgia (see Defs. Exh. 6).

Even assuming that McPhaul indeed met her burden to show that she suffered from fibromyalgia at the time she requested reduced work hours, whether or not she had received a formal diagnosis by that point, Defendants argue that McPhaul has produced no evidence showing that the condition substantially interfered with her ability to work. The Seventh Circuit described fibromyalgia in the context of disability cases as follows:

> [F]ibromyalgia, also known as fibrositis [is] common, but elusive and mysterious, disease, much like chronic fatigue syndrome, with which it shares a number of features. Its cause or causes are unknown, there is no cure, and, of greatest importance to disability law, its symptoms are entirely subjective. There are no laboratory tests for the presence of severity of fibromyalgia. The principal symptoms are "pain all over," fatigue, disturbed sleep, stiffness, and --the only symptom that discriminates between it and other diseases of a rheumatic character -- multiple tender spots, more precisely 18 fixed locations on the body

> (and the rule of thumb is that the patient must have at least 11 of them to be diagnosed as having fibromyalgia) that when pressed firmly cause the patient to flinch. All these symptoms are easy to fake . . . . Some people may have such a severe case of fibromyalgia as to be totally disabled from working, but most do not and the question is whether [the plaintiff] is one of the minority.

Sarchet v. Chater, 78 F.3d 305, 306-307 (7th Cir. 1996) (citations omitted). McPhaul testified in her deposition that her fibromyalgia was disabling because the pain from this condition made it difficult for her to write at times, made it hard for her to concentrate because it prevented her from getting sufficient sleep, made it difficult for her to walk sometimes and made her tired. See McPhaul Dep. at 49-54. McPhaul admitted that "she could still write. It would just be hard to do that sometimes," and that while it was painful to walk sometimes, she would still be able to walk, "it would just be real hard and painful." McPhaul Dep. at 51-52. McPhaul concedes that none of her doctors recommended any modification or change in her work routine on the basis of her fibromyalgia. See McPhaul, Dep. at 48-49, 63.

Reviewing the evidence in a light most favorable to McPhaul, as we must, we fmd that she has produced insufficient evidence from which a reasonable fact finder could conclude that her fibromyalgia substantially interfered with the major life activity of working. In order for an individual to be substantially limited in the major life activity of working, she must be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in

various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(ii). McPhaul does not have expert witness testimony describing how debilitating her condition was and how that condition affected her work performance or other abilities. She has not presented evidence showing that her condition restricted her from a broad range of jobs or how her abilities as limited by her disability compared to the average person with similar training, skills and abilities. In fact, McPhaul concedes in her disposition that she applied for nursing jobs upon her discharge from WIC and worked as a nurse for Interim Healthcare in the summer of 1996. See McPhaul Dep. at 29. McPhaul provides no evidence regarding the severity of her condition or its permanent or long-term effects. We only have evidence showing McPhaul's medical diagnosis of fibromyalgia and her own testimony that she experienced a lot of pain and had difficulty sometimes with writing and walking and that she was sleep-deprived, and this evidence does not rise to the level of creating a genuine issue of material fact that she was substantially limited in her ability to perform major life activities. Thus we find that McPhaul has not met her burden to show that she was disabled under the ADA on account of fibromyalgia.

Our conclusion is supported by the district court's opinion in a case quite similar to this one, Chamberlain v. McNeil Consumer Products Co., 1998 WL 42271 (N.D. Ill. Jan. 29, 1998). The court in Chamberlain found that a plaintiff suffering from fibromyalgia failed to show that she was substantially limited in her ability to perform major life activities where the plaintiff described symptoms of "fatigue,

extreme fatigue flu-like symptoms, pain, muscular soreness and tenderness, spaciness, inability to remember some things, memory dysfunction, sleep, inability to sleep, scatteredness in thinking, tender points . . . . She said that her condition 'waxes and wanes' and that many times she just comes home from work and goes to bed." Chamberlain, 1998 WL 42271 at *4. The court found the plaintiff's general complaints of fatigue and other symptoms inadequate, stating, "At most, this evidence shows that fibromyaigia has affected her life and that she has had to make some adjustments to cope with her condition. This falls short of establishing that she is significantly restricted in performing major life activities." Chamberlain, 1998 WL 42271 at *4, 5. See also Aquinas v. Federal Express Corp., 940 F. Supp. 73, 78 (S.D.N.Y. 1996) (plaintiff suffering from fibromyalgia not disabled because she failed to produce evidence relating to the categories of employment from which she was restricted and she was not medically restricted in any way, holding, "even assuming that [the plaintiff] suffers from a physical impairment that causes her considerable pain, discomfort and alteration of her activities, she is not 'disabled' within the meaning of the ADA").

Having found that McPhaul failed to produce sufficient evidence from which a reasonable fact finder could conclude that she was disabled within the meaning of the ADA because of cancer, asthma, bacterial endocarditis and fibromyalgia, we grant Defendants' motion for summary judgment as to

McPhaul's claim that Defendants failed to reasonably accommodate her disability in violation of the ADA.[10]

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[10] We note that McPhaul also claims that she is disabled within the meaning of the ADA by arguing that she has medical records of her impairment and that Defendants regarded her as having an impairment. These other two tests are inapplicable to the facts of this case.

"[A] record of such impairment" means that the plaintiff must show that she "has a history of . . . a . . . physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k). As set forth above, McPhaul cannot show that she had an impairment that substantially limited major life activities; similarly, she does not have a sufficient record ora history of such impairment within the meaning of the ADA.

McPhaul cannot succeed on her claim that she was regarded as disabled because this definition of disabled involves a perceived disability, one that is contrary to fact, whereby the employer's mistaken perception of the employee's disability in effect creates a disability because the employer treats the employee differently by restricting her duties or otherwise interfering with her job performance. See 29 C.F.R. § 1630.2(i); School Bd. of Nassau County v. Arline, 480 U.S. 273,283, 107 S.Ct. 1123, 1128-1129. The district court in McCullough v. Atlanta Beverage Co., 929 F. Supp. 1489 (N.D. Ga. 1996) held, "[A]n employer becomes subject to this prong of the statute only when he inaccurately 'perceives' as disabled, an employee, who is not substantially impaired, and thereafter negatively stereotypes that employee's abilities to the latter's detriment . . . . [T]he defendant's recognition of plaintiff's limitations was not an erroneous perception but instead was a recognition of a fact called to defendant's attention by plaintiff's own physician. Indeed, in every other section of his response, plaintiff argues that he was, in fact, disabled." McCullough v. Atlanta Beverage Co., 929 F. Supp. 1489, 1498 (N.D. Ga. 1996). Similarly, any knowledge that Defendants had of McPhaul's alleged impairments originated from McPhaul's complaints and medical records and thus we find that McPhaul cannot show that she was "regarded as disabled" within the meaning of the ADA.

Plaintiff's Equal Protection and § 1983 Claims

McPhaul also asserts claims under the Equal Protection Clause and § 1983, contending that Defendants discriminated against her on the basis of race in demoting her to the position of Intake Clerk, refusing her request to reduce her work hours and creating a hostile work environment. Defendants argue that these claims cannot succeed because McPhaul has presented no evidence of discriminatory intent in connection with her transfer to the Intake Clerk position or the refusal to reduce her hours and that the conduct alleged by McPhaul in relation to her hostile work environment claim is not sufficiently severe or pervasive to constitute a claim. Section 1983 provides in relevant part:

> Any person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or any other proper proceeding for redress.

42 U.S.C. § 1983. "A person bringing an action under the Equal Protection Clause must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly." Trautvetter v. Quick, 916 F.2d 1140, 1150 (7th Cir. 1990); see also Minority Police Officers v. City of South Bend, 801 F.d 964, 966 (7th Cir. 1986) ("The Equal Protection Clause of the Fourteenth Amendment is violated only if the defendants have acted with

a discriminatory purpose or intent"); Mescall v. Burrus, 603 F.2d 1266, 1270-1271 (7th Cir. 1979) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause").

McPhaul may prove intentional discrimination through the use of indirect evidence under the burden-shifting test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973) or through the production of direct evidence of discrimination. Under the McDonnell Douglas test, McPhaul first must establish a prima facie case of discrimination by showing that (1) she was a member of a protected class, (2) she was performing according to her employer's legitimate expectations, (3) she was subjected to an adverse employment action and (4) similarly situated employees received more favorable treatment. See Carson v. Bethlehem Steel Corp., 82 F.3d 157, 158 (7th Cir. 1996). If McPhaul establishes the elements of her prima facie case, there is an inference of impermissible discrimination and the burden shifts to Defendants to articulate a legitimate, nondiscriminatory reason for the adverse employment action. See Gonzalez v. Ingersoll Milling Machine Co., 133 F.3d 1025, 1032 (7th Cir. 1998); Brill v. Lante Corp., 119 F.3d 1266, 1270 (7th Cir. 1997). "The defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by a trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507, 113 S.Ct. 2742, 2747 (1993).

If Defendants are able to do so successfully, the burden shifts back to McPhaul to demonstrate that the

proffered reasons are pretext for discrimination. See McDonnell Douglas, 411 U.S. at 804, 93 S.Ct. at 1825; Brill, 119 F.3d at 1270. "[T]he issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the employer honestly believes in the reasons it offers." McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 373 (7th Cir. 1992). McPhaul may prove pretext by showing "(1) Defendant's explanation had no basis in fact, or (2) the explanation was not the "real" reason, or (3) . . . the reason stated was insufficient to warrant the [adverse job action]." Bahl v. Royal Indemnity Co., 115 F.3d 1283, 1291 (7th Cir. 1997) (quoting Johnson v. City. of Fort Wayne, 91 F.3d 922, 931 (7th Cir. 1996)). Ultimately, McPhaul retains the burden of persuading the trier of fact that Defendants intentionally discriminated against her. See Hicks, 509 U.S. at 507, 113 S.Ct. at 2747; Mills v. First Fed. Say. & Loan Ass'n, 83 F.3d 833, 845 (7th Cir. 1996).

There is no dispute that McPhaul's race is black and thus falls within a protected class, but Defendants argue that McPhaul has not shown that she was performing her job satisfactorily, that the job transfer and refusal to reduce McPhaul's hours were materially adverse employment actions and that similarly situated employees were treated more favorably. However, we well assume for the sake of argument that McPhaul has established her prima facie case. The burden now shifts to Defendants to articulate legitimate, nondiscriminatory reasons for its actions. Defendants assert that McPhaul was transferred to the position of Intake Clerk for the following reasons: "McPhaul first began as a nurse nutritionist but in May 1995 was moved to the position of intake counsellor [sic]. McPhaul was transferred to intake

after we noticed her nursing notes in the clients' charts began to appear identical for different clients . . . . Because McPhaul was having problems performing as a nurse nutritionist we believed that transferring her to intake counsellor [sic] would provide her with easier work. The transfer was intended to assist McPhaul." Horine Aff. ¶¶ 4-5. In McPhaul's personnel records, Horine made the following entry:

> It has been brought to my attention that over the past few weeks Cheryl's charting has been drastically changed. She is writing the same thing on almost all of her charts in her SOAP notes even the infants which is totally inappropriate. When I went over this with her she didn't think this was a problem. I explained to her that the way she charted before was the right way and especially on the infants. It was after this discussion I decided to change Cheryl's job responsibilities. She was in agreement with and appeared to welcome the change.

Defs. Exh. 14, Personnel Records of McPhaul, Entry on May 10, 1995. McPhaul argues that she was told by Horine that "the intake position would be easier on her and would help her with her physical condition because it was less work." Plaint. Resp. Br. at 20; see also McPhaul Dep. at 137-138. McPhaul contends that Horine never mentioned any alleged job performance problems.

We find that McPhaul's argument that Defendants claimed they were transferring her on the basis of her health

does not meaningfully contradict Defendants' proffered reason of unsatisfactory job performance for her transfer, as McPhaul's health problems were part and parcel of her inability to perform the nurse nutritionist job properly; from Defendants' perspective, the two are intrinsically connected, as health problems frequently give rise to job performance concerns. In addition, McPhaul does not dispute that her job performance as a nurse nutritionist was unsatisfactory. Even if McPhaul has sufficiently supported her assertion that no one ever mentioned performance problems to her, despite the evidence in her personnel records that she was so informed, McPhaul merely challenges Defendant's asserted health-related reason for transferring her to the intake position on the basis that the intake position was not in fact easier than the nurse nutritionist position and that she was treated differently from the other intake worker because she had to service more clients and was given less time off from work. However, McPhaul's criticism of the accuracy of Defendants reason for transferring her on the basis of her health problems is not well supported by evidence and does not undermine the legitimacy of the proffered reason, i.e., whether Defendants actually believed an intake position would be easier for her or that concern for her health was the real reason for her transfer or that it was a sufficient reason for her transfer. McPhaul produces absolutely no evidence to prove that Defendants' asserted reasons were pretext for racial discrimination. Whether or not McPhaul was treated as well or as fairly as the other intake employee is irrelevant in the absence of evidence showing that Defendants treated McPhaul differently on the basis of her race. There is no evidence of discriminatory intent and thus McPhaul's claim that Defendants violated her equal protection rights when they transferred her to the

position of Intake Clerk must fail. Accordingly, we grant summary judgment in favor of Defendants on this claim.

Similarly, the evidence does not support McPhaul's claim that Defendants discriminated against her on the basis of her race when they refused to reduce her work hours. Defendants assert that, even assuming that McPhaul indeed made such a request, which Horine denies (see Horine Aff. ¶ 12), it was refused for a legitimate, nondiscriminatory reason. McPhaul's complaint states, "The Board, MCBH and Horine unlawfully discriminated against plaintiff because of her race by refusing to accommodate her request for fewer hours while honoring the request for less hours of a less senior, white, employee . . . ." Compl. ¶ 27. McPhaul testified in her deposition that her request was denied because Horine told McPhaul that she had already reduced hours for the other Intake Clerk, Shock.

McPhaul challenges this reason on the basis that she, McPhaul, had more seniority and was experiencing health problems. Defendants assert that the evidence shows that Shock's hours were never reduced, though Shock may have left early upon occasion or taken vacation time or sick leave. See Horine Aff. ¶ 12; Defs. Exh. 17, Personnel Records of Marcia Shock. Defendants also contend that McPhaul does not support her assertion that reducing her hours would have helped her job performance: she has no doctor's statement or any other evidence showing that reduced hours would have improved her condition and/or job performance and productivity, and thus they assert that McPhaul's request for reduced hours was refused because she offered no compelling reason to grant it. Further, McPhaul does not produce any evidence indicating that Shock was any less entitled to having

her hours reduced than McPhaul; McPhaul does not dispute that Shock requested reduced hours before McPhaul did, but only argues that McPhaul had more seniority over Shock and was suffering from ill health. However, McPhaul does not argue or present evidence to show that Shock did not have some other compelling reason to work less hours, and without more evidence, the mere fact that McPhaul's request for reduced hours was denied in spite of McPhaul's seniority and health problems is not enough to prove race discrimination.

In short, McPhaul has produced no evidence indicating that Defendants refused to grant McPhaul's request for reduced hours on the basis of her race. Considering the evidence in a light most favorable to McPhaul, we find that she has failed to show adequately for purposes of summary judgment that Defendants' proffered reasons are pretextual and further, that she has failed to satisfy her burden of persuasion that Defendants intentionally discriminated against her. Thus, we find that McPhaul's equal protection claim that Defendants refused to reduce her work hours on the basis of her race is not supported by the evidence and grant Defendant's motion for summary judgment as to this claim.

Defendants also move for summary judgment on McPhaul's hostile work environment claim. McPhaul asserts in her complaint that Defendants discriminated against her on the basis of race "by knowingly permitting a co-worker to subject her to racial harassment and create a racially hostile working environment . . . . "Compl. ¶ 25. McPhaul alleges that Marcia Shock, her co-worker in intake, harassed McPhaul by repeatedly using the racial epithet "nigger" and making reference to the Ku Klux Klan. McPhaul claims that

Shock used such terms at least weekly, although she could only recall two to four incidents specifically.

> One time we were going down to, I think it was some kind of conference and I was in the car with Cheryl Rogers and [Shock] and she was talking about the O.J. Simpson case and she was asking something about it, if I saw it, and I told her before she even started that I felt that it was a ease that people got very easily upset about and friendships were, you know, kind of ruined from stuff like that and so I would rather not discuss it. But she went on discussing it and ended up having the N word in it.

McPhaul Dep. at 143.

Another incident McPhaul recounts involved a client of WIC who came in and asked for directions to the voucher office, took care of her business and left. After the woman left Shock approached McPhaul and Horine very excitedly and asked them if they had seen the woman and reported that the woman had asked about McPhaul and Shock's boss, Horine, and had said to Shock that Horine "looks just like a little nigger lady that used to work in Florida that I once knew." McPhaul Dep. at 144. McPhaul claims that she turned to Horine and said that this was the type of conduct from Shock that McPhaul had been describing to Horine. See McPhaul Dep. at 144.

McPhaul admits that Shock claimed to be repeating the client's words but intimates that it was some sort of pretense.

"Well, if that's the case, every client that came in here had that N word on their lips and I never noticed that before." McPhaul Dep. at 144. "[Shock] would always say well, this client said, you know, the N word for some reason or other. She'd bring out a sentence that somehow they said it. But I never heard that." McPhaul Dep. at 145. McPhaul admits that Shock never referred to McPhaul as a "nigger" but asserts, "She said it so often that it kind of blurred and ran into - whether she said it to me or about me or somebody else, it was still just as offensive to hear the word." McPhaul Dep. at 147.

McPhaul relates two other incidents, one in which Shock commented on the fact that a client was black and her baby was very light-skinned and wanted McPhaul to see the baby, and another in which Shock reported to McPhaul that the Ku Klux Klan had targeted Shock's family. See McPhaul Dep. at 149. McPhaul asserts that Shock must have been making up the story because:

> she was not a dark person. There was no way that she -- and she's not Jewish, so there's no way that they had done that. But she was always making up some kind of stuff. If you had something wrong with you and you had a hemoglobin of 6, hers was less, you know, or whatever you had. I mean, she was just one of those kind of people that had something to say about everything.

McPhaul Dep. at 149-150. McPhaul claims that she approached Horine several times to try to get her to stop Shock from making such racial remarks but that Horine only

told her to ignore it, and McPhaul believes that Horine allowed Shock's conduct to continue because McPhaul was black. See McPhaul Dep. at 153.

McPhaul describes her subjective reaction to Shock's remarks, stating, "[A]fter the hundredth time of hearing the word nigger, it's offensive to me. I get tired of it . . . . I'm used to, I mean, you know, every black person has had that said to them . . . . One or two times that she says nigger and it comes up in a conversation, I can understand that. But when you manage to do it every week at least come up with this N word, it's very offensive to me and I'm tired of it and I don't want to hear about the Ku Klux Klan every week, either, and she would always try to manage some kind of way that she got this conversation." McPhaul Dep. at 151.

"In general, the standard for evaluating a § 1983 claim for violation of equal protection based on harassment in the workplace is the same as for a Title VII claim. Kelly v. Municipal Court of Marion County, 852 F. Supp. 724, 737 (S.D. Ind. 1994) (citing King v. Board of Regents of Univ. of Wisconsin System, 898 F.2d 533, 537 (7th Cir. 1990)). In order for a plaintiff to have an actionable hostile work environment claim, a work environment must be objectively hostile. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370 (1993); Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1454 (7th Cir. 1994); Ripberger v. Western Ohio Pizza, Inc., 908 F. Supp. 614, 618-19 (S.D. Ind. 1995). Although there is no mathematically precise test to determine whether an environment is objectively hostile, (Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995)), appropriate factors to consider in assessing an environment include: "the frequency of the discriminatory conduct; its

severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S. at 23, 114 S.Ct. at 371; Cowan v. Prudential Ins. Co., 141 F.3d 751,757 (7th Cir. 1998). In addition, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405 (1986). "It is critical, in sexual harassment cases, to distinguish between a merely unpleasant working environment on one hand and a hostile or deeply repugnant one on the other." Gleason v. Mesirow Financial, Inc., 118 F.3d 1134, 1144 (7th Cir. 1997).

McPhaul must also prove the element of intent, since "one difference between an equal protection and Title VII harassment claim is that the defendant must intend to harass under the former but not the latter." Kelly, 852 F. Supp. at 737 (citing King, 898 F.2d at 537; Trautvetter, 916 F.2d at 1149; Huebschen v. Department of Health and Soc. Serv., 716 F.2d 1167, 1171 (7th Cir. 1983)). McPhaul may prove intentional discrimination by Defendants through evidence of direct participation in the harassing conduct or by showing that Defendants "act[ed] or fail[ed] to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or [that] the conduct causing the constitutional deprivation occur[red] at [Defendants'] direction or with [their] knowledge and consent." Kelly, 852 F. Supp. at 737 (quoting Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982)).

The conduct described by McPhaul, while certainly unpleasant and in poor taste, does not rise to the level of

creating an objectively hostile and abusive work environment. McPhaul recounts only four incidents but states that racially-charged words were used weekly by Shock. Considering the evidence in a light most favorable to McPhaul we will assume for purposes of this motion that the conduct was frequent, though we have little evidentiary support. However, McPhaul does not assert that Shock was hurling racial epithets or taunts at her on a weekly basis. Rather, McPhaul describes the conduct of a co-worker who appears insensitive to, or ignorant of, the offensive impact of her words and who never insulted McPhaul directly but merely repeated unpleasant words that others used in relating the content of their conversations. In addition, none of the incidents recounted by McPhaul include the use of the "N word" or reference to the Ku Klux Klan in an intentionally racially derogatory and negative manner; although the "N word" is certainly not race-neutral, it does not appear that the term was used as an epithet or slur, and the mere mention of the Ku Klux Klan, without evincing support for its beliefs and particularly when decrying its actions, is not overtly racist. Also, one of the primary incidents related by McPhaul involved a statement by Shock that the Ku Klux Klan had attacked Shock's own family, certainly not a conversation that a reasonable person would construe as offensive. In any event, the "mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment," nor do "occasional or sporadic instances of racial or ethnic slurs." Kelly, 852 F. Supp. at 737.

McPhaul relies upon Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 673 (7th Cir. 1993), which held that the evidence supported a racially hostile work environment and noted that the plaintiff "was deeply affected

by [the supervisor's] use of the term 'nigger,' even if [the supervisor] had not directed the epithet at [plaintiff] personally." The court stated, "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." Rodgers, 12 F.3d at 673. However, McPhaul's reliance on this opinion is somewhat misplaced, as the present circumstances involve a co-worker, not a supervisor. As the Seventh Circuit stated in Rodgers, "a supervisor's use of the term impacts the work environment far more severely than use by co-equals." Rodgers, 12 F.3d at 675. In addition to the status of the speaker, the context of the use of the word is important. In Rodgers, the supervisor allegedly stated in a bold, demanding tone, "You black guys are too fucking dumb to be insurance agents" and other overtly racist comments. Rodgers, 12 F.3d at 671. Here, there is no dispute that Shock never directed the "N word" at McPhaul nor spoke the word personally regarding anyone; rather, Shock merely repeated in a confiding manner the content of other people's conversations who had used the word. In mentioning the Ku Klux Klan, Shock recounted her own personal experience with the Klan, again, nothing directed personally at McPhaul or at anyone else. The incident in which Shock exclaimed over the lightness of the baby's skin does not appear to be discriminatory conduct aimed at McPhaul but instead reveals some level of cultural naivete or insensitivity. In fact, the entire course of Shock's conduct can be attributed to this ignorance, and McPhaul produces no evidence to raise such conduct to the level of a hostile work environment. Because a reasonable person would not find Shock's conduct so severely or pervasively discriminatory as

to create a hostile or abusive work environment, we find that McPhaul's claim must fail.

Moreover, even looking at the situation subjectively, McPhaul does not appear to-regard the atmosphere as abusive, but merely offensive and tiresome. She states in her deposition that the repeated use of the word "nigger" was "offensive" to her and that she "was tired of it." We have no further information regarding her reaction to Shock's conduct, but certainly McPhaul's testimony does not reveal how hearing such terms interfered with McPhaul's job performance or made the atmosphere abusive for her or caused McPhaul any psychological harm so as to alter the conditions of her employment.

In addition, McPhaul fails to support her theory that Horine failed to intervene on the basis of McPhaul's race. Even assuming that McPhaul adequately has shown that she complained of the alleged conduct, though Horine disputes it, McPhaul fails to produce any evidence that Horine deliberately or recklessly disregarded McPhaul's equal protection rights. McPhaul claims that Horine acted with discriminatory intent on the basis of McPhaul's race because "I can't think of any other reason why other than that." This vague, baseless assertion does not provide evidence that Horine directly participated in the alleged conduct or directed its occurrence or knew and consented to such behavior, and thus we find that McPhaul fails to meet her burden to prove the element of intent. Having found that the conduct alleged by McPhaul does not constitute conduct that a reasonable person would perceive as hostile or abusive, or even that McPhaul herself considered abusive, and that McPhaul has failed to prove Defendants' discriminatory intent, we grant

Defendants' motion for summary judgment as to McPhaul's hostile work environment claim.

Defendants also move for summary judgment on McPhaul's claim that Defendants retaliated against her for filing a complaint with the EEOC by providing negative references to McPhaul's potential future employers after she was terminated from WIC. Defendants assert that McPhaul cannot pursue her retaliation claim under Title VII or the ADA because she has not been issued a right-to-sue letter, a prerequisite for suit as provided in 42 U.S.C. § 2000e-5 and 42 U.S.C. § 12117. In addition, Defendants argue that the Equal Protection Clause does not provide a remedy for retaliation claims, citing Gray v. Lacke, 885 F.2d 399, 414 (7th Cir. 1989). Defendants also contend that McPhaul's retaliation claim is barred because she signed a release form unconditionally waiving all claims to causes of action arising from references provided by WIC. See Defs. Exh. 19. McPhaul fails to respond to Defendants' arguments and her failure to respond constitutes an admission that there is no genuine issue of material fact. See Nabozny v. Podlesny, 92 F.3d 446, 457 n.9 (7th Cir. 1996); Glass v. Dachel, 2 F.3d 733, 739 (7th Cir. 1993). Reviewing the undisputed material facts, we conclude that McPhaul cannot succeed on her retaliation claim and grant Defendants' motion for summary judgment on this claim. Because we have granted Defendants' motion for summary judgment as to all of McPhaul's claims, we do not need to reach the issues of immunity and the existence of a municipal policy or custom or any other arguments advanced by the parties in connection with the motion for summary judgment.

Plaintiff's Claims Against Defendant, Madison County Board of Health

Defendant, the Madison County Board of Health (the "Health Board"), was added as a party in McPhaul's Third Amended Complaint filed October 22, 1998 in response to one of the County's defenses asserting that McPhaul had sued the wrong party. The County argued in its motion for summary judgment that McPhaul could not impose liability upon the County or Horine because they do not have final policymaking authority over the personnel decisions for WIC, a subdivision of the Madison County Department of Health, but that such authority is vested in the Health Board. According to the Court's records, the Health Board has not yet been served with a summons and complaint and thus is not properly a party to this action at this time.

However, we have disposed of all of McPhaul's claims against the other defendants to this action, and McPhaul's claims against the Health Board are based upon the same set of facts and governed by the same legal standards as the claims adjudicated above. In addition, the Health Board's liability is derivative in nature, as it is based upon the alleged constitutional violations of others, the merits of which claims we have decided in favor of Defendants Horine and the County. Therefore, we see no reason to retain jurisdiction over a case with no remaining meritorious claims to decide and thus we dismiss with prejudice McPhaul's claims against the Health Board for the same reasons as the Court granted summary judgment in favor of the Defendants Horine and the County, as set forth in the Court's discussion above.

CONCLUSION

Defendants Arlene Horine and the Board of Commissioners of Madison County move for summary judgment as to Plaintiff's claims that Defendants failed to reasonably accommodate her disability under the ADA, discriminated against her on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment and § 1983 and retaliated against her for filing an EEOC charge. Defendants argue that (1) Plaintiff is not disabled within the meaning of the ADA, (2) Plaintiff has failed to prove that Defendants intentionally discriminated against her on the basis of race by transferring her to the position of Intake Clerk and refusing her request to reduce her work hours, (3) Plaintiff has not alleged conduct sufficiently abusive to create a hostile work environment on the basis of race and (4) Plaintiff cannot assert a claim for retaliation under Title VII, the ADA or the Equal Protection Clause. For the reasons set forth in the Court's discussion above, we grant Defendants' motion for summary judgment as to all of Plaintiff's claims and dismiss with prejudice Plaintiff's claims against Defendant, the Madison County Board of Health.

It is so ORDERED this 11th day of December 1998.

/s/_____
SARAH EVANS BARKER, CHIEF JUDGE
United States District Court
Southern District of Indiana

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
CAUSE NO. IP97-0097-C-B/S

CHERYL K. MCPHAUL,
Plaintiff,

vs.

BOARD OF COMMISSIONERS OF MADISON COUNTY and ARLENE HORNE, in her official and individual capacity,
Defendant.

The deposition upon oral examination of **CHERYL K. MCPHAUL**, a witness produced and sworn before me, Michael C. Callahan, a Notary Public in and for the County of Marion, State of Indiana, taken on behalf of the defendants at the law offices of Norris, Choplin & Schroeder, Suite 900, 101 West Ohio Street, Indianapolis, Marion County, Indiana, on the 17th day of June, 1998, pursuant to the Federal Rules of Civil Procedure.

* * * *

[Page 10]

Q. Tremayne and Ralph

A. Uh-huh.

Q. Okay. The name of Ralph Rowe's father. Can I have his name, please?

A. Same as Ralph.

Q. Okay. And Tremayne Rowe's father's name?

A. His father's name is William Cortez.

Q. Was Tremayne adopted by Arthur McPhaul?

A. No. They just had the same last name. They went by my name.

Q. Okay. When you graduated from your nursing program there in Anderson, what year was your graduation?

A. '87.

Q. Okay. Now, was than in the fall or in the spring?

A. I'm trying to remember because it was real close to the season change there. I know it was in June.

Q. Now, did you start working as a nurse right away?

A. I started working, yes, pretty much right after that.

Q. Okay. And can you tell me where your first job then as a –

* * * *

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Q. And what were your responsibilities?

A. Doing counseling with the clients and certifying them.

Q. Okay. What does WIC stand for?

A. Women, infant and children.

Q. And what is that program?

A. Supplemental. You give supplemental food to infants, children before they're five years old and pregnant women.

Q. So as a nurse nutritionist, did you work then with the children and the pregnant mothers?

A. You had all different clients, you know, that came through there.

Q. Okay. They were WIC clients?

A. Yes.

Q. Okay. You have filed a claim under the Americans with Disabilities Act.

A. Yes.

Q. And I think we touched upon this briefly earlier. What physical illnesses or conditions or disabilities are you claiming what WIC failed to accommodate?

A. I had cancer in '94 and '95 and then fibromyalgia in '95 and '96 and to the present time.

Q. So it's just the cancer and fibromyalgia?

A. Yes. I have asthma and bacterial endocarditis. I've had that before and chronic fatigue.

Q. Okay. Now, so that's five things. Those are your five disabilities?

A. Well, the cancer and the fibromyalgia and chronic fatigue. I don't know whether they would consider the asthma as a disability, or the bacterial endocarditis, either.

Q. Okay. Now, what is your understanding of what if fibromyalgia?

A. Well, fibromyalgia is a host of things and the combination together is what makes it a disability.

Q. Okay. What are the host of things to which you're referring?

A. Depression, anxiety, pain in the muscle. Irritable bowel. Frequent urination. Lots of pain from head to toe all over. Intolerance to heat and cold.

Q. Okay.

A. Fatigue, extreme.

Q. And when did you discover or who told you that you had fibromyalgia?

A. The first doctor was at the Mayo Clinic, Dr. Van Dellen.

Q. And that would have been during -

A. January of '96.

Q. Okay. And you were there from, what? - January 9th to January 12th?

A. To about the 12th maybe. Maybe a little bit longer.

Q. And what did, when Dr. Van Dellen made this diagnosis, what did he tell you, recommend by way of treatment?

A. What he wanted me to do, he didn't want to give me medicine right then, he wanted me to go back to Indiana to the specialist and get my medication from

them because he thought that maybe the specialist might prescribe maybe something different than what he would have prescribed for it.

Q. Okay. Is there a fibromyalgia specialist?

A. Yes.

Q. And who is that?

A. Mine was Dr. Hughes.

Q. And what is Dr. Hughes' area of expertise?

A. He's a rheumatologist. Any type of immune disorder or collagen disease.

Q. Now, did Dr. Van Dellen - so Dr. Van Dellen didn't want you to get any medicine. Did he tell you that there was anything that he wanted you to do other than to go see a specialist?

A. Well, he wanted me to do, he did recommend that I do the exercises, you know, do the exercises because he said that that helps some with that. He - actually, they really didn't get to do as much as they wanted to because they had wanted me to stay longer and actually we didn't get to complete everything that, you know, so he could have done more after that or told me to do more but I had to cut the visit short.

Q. So Dr. Van Dellen, did he recommend that you make any changes in lifestyle?

A. No, because there wasn't much I was doing. I don't drink, I don't smoke, I don't get, you know, take drugs or anything like that. So other than doing the exercise, that would I guess basically be it but you'll have to –

Q. Did he recommend any modification or change in your work routine?

A. He didn't mention that at the time but he did, one of the things that we did talk about was the tiredness that I felt all the time, and like I said, he said that the other doctor, he wanted him to prescribe whatever he would have to give me for that.

Q. Okay. So he did not recommend a modification or change of work routine?

A. No, but one of the things that we did discuss was that I might not have a job when I got back so I don't know if he thought that that would not be necessary to do that or not.

Q. But regardless, he didn't say whether it's this job or any other job, he didn't –

A. Well, like I say, we didn't get to finish up because I had to go back. I thought I was going to lose my job. My daughter told me that Arleen had told her that I had to come home immediately. So I thought, you know, I told him that I had to get back because I might not have a job.

Q. So he didn't say you need to work less hours –

A. We didn't get to finish any of that. Like I said, he said that he wanted, in the letter that he sent, he said that he wanted to do more and, you know, go on with the examination and more interviews but he couldn't do that because I had to cut it short.

Q. But he did not recommend that you reduce you work hours, did he? That's a simple yes or no question.

A. He didn't get opportunity. No, he didn't get opportunity to do that.

Q. Okay. So then when did you first see Dr. Hughes?

A. February 1st.

Q. Okay. Does your fibromyalgia, did it interfere with taking care of yourself?

A. How do you mean taking care of yourself?

Q. Were you able to take care of yourself as in being able to change your clothes, bathe yourself, administer personal care to yourself?

A. It was hard to do that.

Q. Okay. What was hard about it?

A. Well, the fact that you were always tired. I had problems with my legs hurting a lot. Hands, my knuckles would be real sore.

Q. Did that prevent you from being able to bathe yourself or change your clothes?

A. It made it pretty difficult. It's like, it's arthritis.

Q. So did you have to have assistance?

A. Yes. Where I could use a back brush before on my own, I would maybe have to have somebody help me to do that.

Q. And who helped you?

A. My daughters.

Q. And so anything else - okay. So you weren't able to use the back brush on yourself when you bathed?

A. Uh-huh.

Q. Anything else?

A. Walking was difficult.

Q. And why was walking difficult?

A. I don't know. It's something about the fibromyalgia. You can be sitting down and you get up and you can't hardly walk. You can't, your legs don't want to

cooperate. It hurts really bad and they're real stiff. Also they would go to sleep. Numbness and tingling. You had a lot of that all over.

Q. Okay. So the inability to use the back brush, walking difficult. Anything else?

A. Extreme tiredness. No sleeping at night.

Q. Were you able to use your hands?

A. It was real difficult. Sometimes I could and sometimes it would hurt to like us a pencil or a pen and sometimes it would hurt to move your, to use your fingers. Sometimes they didn't want to bend to use a pencil.

Q. I notice you saying sometimes they didn't. Are you still under the care of a doctor for –

A. Oh, fibromyalgia you don't get rid of. It stays with you forever.

Q. Okay. Dr. Hughes, is that the physician who's treated you for it?

A. Yes.

Q. And when was the last time you saw him?

A. I saw him in January.

Q. Okay. So were there manual tasks that you were unable to perform?

A. What do you mean when you say tests?

Q. Tasks.

A. Tasks. Yes. Like writing sometimes would be difficult.

Q. But were you still able to write?

A. Yes, you could still write. It just would be hard to do that sometimes.

Q. Now, when you say it was difficulty with walking –

A. Uh-huh. Yes.

Q. – it was painful to walk?

A. Yes. And sometimes you just couldn't move, you couldn't get your legs to do what they were supposed to do.

Q. But you would be able to walk?

A. Yes. It would just be real hard and painful.

Q. Let's see. Did it interfere with your seeing in any way?

A. The fibromyalgia you mean?

Q. Yes.

A. No. Just my eyes just got bad at 50. They just went from good to bad.

Q. How about hearing? Did it interfere, fibromyalgia interfere with your hearing?

A. No. I think that sometimes if you were in so much pain you might not hear that but not because you couldn't hear but because you'd be in so much pain you weren't concentrating on anything else but trying to get through that.

Q. What about, does fibromyalgia interfere with speaking?

A. Well, there again, with the concentration, you know, if you were trying - you'd have to concentrate on saying it because you'd be focusing on the head to toe pain.

Q. Would fibromyalgia interfere with breathing?

A. The asthma interfered with the breathing.

Q. Fibromyalgia interfere with your learning? - ability to learn?

A. It might.

Q. In what way?

A. There again, with the pain, you would be concentrating so much on that that you couldn't concentrate on anything else.

Q. Okay. And did it interfere with your working?

A. Yes, it would.

Q. Okay. How did the fibromyalgia interfere with working?

A. Well, with, maybe if you were writing, it would be difficult to write and painful to write. If you didn't get enough sleep, it would be hard to concentrate. And like I said, the pain, you know, it was head to toe pain so it's hard to concentrate when you're in pain, too.

Q. Now, when you say you were in pain, how often were you in pain?

A. Constantly.

Q. Are we talking 24 hours a day?

A. Yes, probably, unless you go to sleep and the medicine knocks you out and you don't know you're in pain. But when you wake up you know you have been.

Q. So 24 hours of pain for, are we talking seven days a week?

A. Uh-huh.

Q. Answer yes or no.

A. Yes.

Q. So over how long of a period of time?

A. Forever. From that time that it started hurting probably in May straight through till now.

Q. Okay. May of what year?

A. May of '95.

Q. Okay. So we're talking from May of 1995 until present –

A. Uh-huh.

Q. – pain of 24 hours a day?

A. Uh-huh.

* * * *

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A. I'm trying to do that, uh-huh.

Q. Doxepin? Is that how you pronounce it?

A. Uh-huh.

Q. And Buspar. Who prescribed those?

A. Dr. Purdy. When I was having a lot of trouble during May up until the January and they couldn't they didn't know what was the problem, so and during that time is when I was, you know, he prescribed that for me.

Q. And he prescribed both of those?

A. He prescribed the Buspar. Dr. Hughes prescribed the Doxepin.

Q. Now, you say you were seeing Dr. Purdy when they didn't know what was going on.

A. Uh-huh.

Q. Prior to going to the Mayo Clinic, no one had diagnosed you with fibromyalgia?

A. No. I had went to the doctor constantly. As a matter of fact, a lot of the conversation that I had with Arleen we discussed how the doctors never could find out anything wrong with you and we frequently talked about that. I went a lot. I even went to, had a, I went to the hospital I think it was in October or November or '95 because my feet had swollen up like loaves of bread. They were bright red. Couldn't use my hands, could barely walk. Stayed in some, just an undescribable pain over a whole weekend and on that Monday went to the emergency room and I asked him, the doctor, what he thought it was after they ran some tests and he said well, the only thing I can tell you is

that it's an inflammatory process which I said to him well, I know that. I mean it has to be with what's going on. But they could never find out what it was.

Q. So then when you say you were seeing the doctor constantly –

A. Uh-huh.

Q. – what doctor were you seeing constantly?

A. That was Purdy.

Q. And when you say you were seeing Dr. Purdy constantly, how often were you seeing him?

A. Oh, it had to be, I don't know, some appointments might have been like two weeks apart or it might have been every month at least.

Q. So when did you tell anyone at WIC about the fibromyalgia?

A. I told them about that in January because I didn't know about it until then. I actually thought that it was my cancer coming back because I was in pain, like I said, constantly and I thought that the pain, that the cancer had metastasized all over my body and they just couldn't find it or didn't know what to look for or where to look for it at.

Q. Okay. So you were at that time fearful that you had cancer throughout your whole body that they couldn't find.

A. Uh-huh.

Q. So then you told her about, you told WIC about this in January?

A. No. Well, when we had, I had an evaluation, I think it was in September, and Arleen asked me was I having any problems and I mentioned that I couldn't sleep and I hurt a lot, you know, head to toe, and I didn't know what it was from and I was extremely tired and I asked her about could I either like go into work later or get off earlier and at that time she was telling me that she had given those accommodations to somebody else. She had done that for a lady that had come to work after I had so she wouldn't give me, she couldn't do that for me.

Q. So she was letting someone else come in work later or leave earlier?

A. Yes, that's what she told me.

Q. Okay. Did this person come in later and leave earlier?

A. Yes. According to my journal, I took notes about when she would come in or when she sometimes would call and say that her child was sick and she couldn't come in that day.

Q. Okay. And this person to whom you are referring –

A. Marcia Shock.

Q. We'll come back to that here in a minute.

A. Okay.

Q. But I wanted to – did you give WIC any documentation from any doctor stating that you had fibromyalgia?

A. I gave her a small card that Dr. Van Dellen had given me when he had me go down to the library to look this up. After he told me what he was sure that I had, he told me to go down to the library, that's what they have you do. They talk to you about it and then they have you go down and read about all the symptoms and like that and so I had that little card and then I had another card that told about the – I showed her the prescription for the asthma that he had given me.

Q. Uh-huh.

A. And there was another card that said I think the bacterial endocarditis and so I told her what I had but I didn't have anything to show her because, like I said, I left quickly and they hadn't done a history, they hadn't wrote, dictated and wrote their history and mailed it off yet.

Q. Okay.

A. I had one after I got fired but that was too late to show her then.

Q. So there is a document -

A. Yes.

Q. - that says that you, from Dr. Van Dellen, that says you suffered from -

A. Oh, yes. He tell about the tests and everything that they ran.

MS. HORSEMAN: Let's get this marked.

(Defendant's Deposition Exhibit No. 3 was marked for identification at this time.)

Q. I'm going to hand you what has been marked as Defendant's Exhibit No. 3

A. Uh-huh

Q. These are records that we have received from the Mayo Clinic. The very first document is a letter from Dr. Van Dellen. Is that the letter to which you are referring?

A. Let's see.

Q. It has a back side. It's copied on two sides.

A. Yes.

Q. Okay. Can you tell me, point out for me in this letter where he states that you are diagnosed as having fibromyalgia?

A. He says it is quite possible she has fibromyalgia but he told me that that's what I had.

Q. But he puts in this letter that it's quite possible.

A. Uh-huh.

Q. All right. And so this is the only documentation that you have from Dr. Van Dellen that you maintain asserts that you have fibromyalgia?

A. No. You should have one from Dr. Hughes that says that, too.

Q. Okay. But I'm just talking about from Dr. Van Dellen.

A. Uh-huh. Yes.

Q. Okay.

A. He would not give a more thorough answer because he said I hadn't been there long enough. He wanted me to be there longer and because I had to cut it short, there would have been other tests that they would have done before, you know, besides that or done it again.

Q. So what accommodation do you maintain that WIC should have made for you in regard to your fibromyalgia?

A. Well, at the time because I was so tired, I felt like if I could have had like an hour before, you know, come in an hour later or went home an hour earlier.

Q. And this was at, coming in later or leaving earlier –

A. Uh-huh.

Q. – was your suggestion?

A. Yes. Well, it wasn't my suggestion. I asked her if that could be done and like I said, she told me that she couldn't because someone else had less hours. She had given another lady the less hours.

Q. Okay. And that request was made in September of 1995?

A. I believe it was. I believe it was. It was when I had an evaluation and I believe it was the first evaluation.

Q. Okay. Now, but no doctor had said that was necessary for you. Correct?

A. No.

MS. HORSEMAN: Okay. Let's go ahead and mark this one.

(Defendant's Deposition exhibit No. 4 was marked for identification at this time.)

Q. Okay. Mrs. McPhaul, I'm handing you what's been marked Defendant's Exhibit No. 4.

A. Uh-huh.

Q. And this is your Second Amended Complaint.

A. Uh-huh.

Q. I'd like you to turn to Paragraph No. 15, . . .

* * * *

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Q. Uh-huh. But the less hours –

A. Well, I felt that the less, if you're talking about accommodation, less hours would be an accommodation. At the time I didn't know I had asthma, I didn't know I had fibromyalgia and I didn't know I had chronic fatigue but I thought that having less hours would help me in terms of not being so tired.

Q. Okay. So then sitting here today having undergone medical treatment with your physicians for the asthma, you're not aware of anyone telling you that an employer needs to make a special accommodation for you because of your asthma?

A. Well, it hasn't come up. I haven't asked them anything like that.

Q. Okay. But no doctor has told you that. Correct?

A. No.

Q. All right. Now, you referred to chronic fatigue. Is that the same thing as fibromyalgia?

A. It's, like I said, there was a host of symptoms with the fibromyalgia and that happens to be one of them.

Q. Okay. So the chronic fatigue is actually part of fibromyalgia?

A. Uh-huh.

Q. I need you to answer yes or no.

A. Yes. Sorry about that.

Q. So then the disability would be the fibromyalgia.

A. Yes. Chronic fatigue could be, too.

Q. Okay. Are you maintaining that you have two disabilities? What is it about the fibromyalgia that makes it a disability?

A. All those host of symptoms.

Q. Okay. Which includes the fatigue.

A. The fatigue, yes. The chronic fatigue.

Q. Okay. So then when you say fibromyalgia and chronic fatigue, when you say fibromyalgia, you are including chronic fatigue. Correct?

A. Yes. It's in with that.

Q. So with your disabilities then, we have fibromyalgia and then the cancer.

A. Uh-huh.

Q. Okay. Now, the cancer, you were treated for colon cancer in February of 1995. Is that correct?

A. Uh-huh. Yes.

Q. And you had surgery at that time. Correct?

A. Yes.

Q. Now, at the time of your surgery, the idea of the surgery was to remove the cancerous portions. Correct?

A. Correct.

Q. Did they remove the cancerous portions?

A. To my knowledge, yes.

Q. Okay. So after the surgery in February, 1995, you no longer had cancer. Correct?

A. To my knowledge, correct.

Q. All right. So then from February, 1995 after the surgery until the present, you don't have cancer. Correct?

A. I have no idea. I mean I could have it.

Q. But you don't know–

A. Because I haven't been back to them to have the work done.

Q. Okay.

A. I haven't had the money.

Q. All right. But you haven't been diagnosed as having cancer. Correct?

A. Not again.

Q. Okay. What accommodation, how do you feel, then, that you were discriminated against by WIC on account of your cancer?

A. Because I wasn't given that accommodation was one reason.

Q. What accommodation?

A. When I asked for less hours.

Q. So the accommodation that you wanted for the cancer was less hours. Correct?

A. Yes. Because at the time I didn't know whether the cancer had come back then.

Q. Okay.

A. And they couldn't find anything. I was having a low hemoglobin which is an indicator sometimes of cancer but they could not find anything.

Q. So then you made the request for less hours in September, 1995. Correct?

A. Uh-huh.

Q. You have to answer yes.

A. Yes.

Q. And at that time, then, you maintain that WIC should have accommodated you in your request because of cancer although you were not diagnosed as having cancer. Am I understanding that correctly?

A. Yes. I wasn't diagnosed with cancer, or I hadn't been again.

Q. And WIC had no reason to believe you had cancer. Correct?

A. Well, at the time Arleen knew that I was going back to the doctor's office having these horrible symptoms but nobody could find anything.

Q. Right. Okay. Have you taken any medications today?

A. No. I wanted to be lucid and very cognizant of what was going on so I didn't take anything.

Q. Now, the request that you made to work a reduced number of hours. That consisted of either coming in an hour later or leaving work an hour earlier. Is that correct?

A. Correct.

Q. Now, that was not suggested to you by any physician. Correct?

A. No. They didn't say that.

Q. All right. And that was completely your suggestion. Correct?

A. Correct.

Q. And you say that you – now, tell me again. You said that you had asked Arleen about reducing the hours but that she could not do that for you?

A. She said she couldn't because she had already reduced hours for someone else.

Q. And that person being Marcia Shock?

A. Correct.

Q. And so then did Marcia Shock either come in an hour later every day or leave an hour earlier every day?

A. It varied.

Q. And when you say it varied, what do you mean?

A. She might come in later. She might go home earlier. She might not come in at all.

Q. Now, how mush seniority did you have over Marcia Shock?

A. Probably, I can't remember whether she started in April or May a year later.

Q. Would you be surprised if she started in 1994?

A. Not unless she hid out somewhere in the building or worked after I left in the evenings or came in before I came in.

Q. Do you know whether, did Marcia Shock ever tell you she made this request?

A. No. Arleen only said that. I'm trying to . . .

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. . . efficient?

A. I felt that getting more rest or having less, that the tiredness resulting from the working those hours and that maybe that would help. Like I said, as that time I didn't know what I had so I couldn't figure out why I was so tired. Besides, I mean I knew I wasn't sleeping at night which made me tireder during the day, too, and sleepier.

Q. Now, when you went to the Mayo Clinic, you arrived there – did you stay in the hospital itself?

A. No. I stayed down the street.

Q. And where was that?

A. I think it's the Campbell Hotel.

Q. And when did you arrive an the Mayo.

A. Maybe that weekend before that.

Q. Okay. So we're talking in 1995.

A. Maybe 8th, 7th, 6th. I'm not sure.

Q. Okay. January 8th would have been a Monday, January 9th would have been a Tuesday and the 7th would have been a Sunday.

A. Okay. So probably, maybe that Sunday. Saturday or Sunday.

Q. So you got in a few days so you could stay in . . .

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Q. Now, you have –

A. Because also the sleep clinic had something that they had me do and he would not have that down for there so he would not necessarily know about me being there on Saturday and Sunday.

Q. Now, so you would have arrived maybe at the Mayo Clinic on January the 7th which would have been a Sunday.

A. Uh-huh

Q. Now, you were off work on January 1st, New Year's day. Correct?

A. Yes. That's a holiday.

Q. And then the 2nd, 3rd, 4th and 5th you also took off work. Isn't that right?

A. That was vacation.

Q. So then you went back to work, then, on the 15th of January which would have been a Monday?

A. Yes.

Q. Okay. Now, you stated earlier that you were told you couldn't extend your stay.

A. Right.

Q. Why don't you tell me about that. When did you talk to Arleen and –

* * * *

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A. I'm not sure if I did. When are you saying that the disability insurance, that I got that?

Q. I believe it came through, what? – in that last part of December?

A. Before I had the cancer?

Q. No. After. This would be right before going to Mayo.

A. Okay. No, because at that time when I had my first evaluation was when I was feeling especially bad. At the time when I got the disability insurance, I wasn't having as much of a problem with the shortness of

breath but I was having a lot of problems with the pain.

Q. Okay. Did you tell the disability insurer about the pain?

A. I doubt if I did. I know I might have told him about going to the doctor but I didn't know what it was. I mean I just figured that maybe they didn't know, there wasn't anything wrong and maybe it was just me thinking that.

Q. How long were you in the position as diet counselor?

A. That was probably, let's see. They called me in one day in May and told me that they had fired one of the medical assistants and that starting Monday I would go in into her position.

Q. And that was in –

A. It was in May.

Q. Okay. And when you say go into that position, that would have been the intake position?

A. Uh-huh.

Q. You need to answer yes or no.

A. Yes.

Q. And did you take any kind of difference in pay? Was there any change in pay between being a – what were you before? As a diet counselor versus intake?

A. To my knowledge it was supposed to be the same thing. They didn't say anything about getting any less.

Q. Okay.

A. The only way I found out that I was getting less is when they did the discovery and we saw that and they said that the rate of pay would be like 2 dollars an hour less than what I had been making.

Q. Okay. You're saying that the discovery said . . .

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. . . her from the nutritionist position to the intake position in violation of the Fourteenth Amendment and of 42 USC Section 1983. What was the difference between the two positions? On what facts do you maintain that you were discriminated against on the basis of your race with the transfer from one job to the other?

A. Well, it was a demotion. There's a big difference between a nutritionist and the intake clerk.

Q. Okay. Demotion in what way?

A. You went down in the amount of work that you had to do was more. I got more clients.

Q. Okay. When, you say the amount of work was more?

A. Uh-huh.

Q. And why do you say that?

A. I got a lot more clients. Before I might have clients every 15 minutes. When you're doing the intake clerk, you're getting a lot more clients coming through there.

Q. You were doing more than a client every 15 minutes?

A. Well, I wasn't doing more every 15 minutes . . .

* * * *

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. . . were treated differently because of your race. What do you mean that you were treated differently?

A. I had more clients. I was not allowed to have less hours like the other lady did. They did not ask me about it like they usually did. They would say if somebody wanted less time they would check with somebody else to see about that or see if that was okay, if that person was doing the same job that you were doing. Nobody conferred with me about that, they just came in and told me. They, when I asked her about the nutritionist's job, there wasn't any input on

that about whether I wanted to go to another position or not, I was just moved over to it just right then. I didn't have time to train or anything for it. I was just brought in one day and said, you know, it was time for you to go on that Monday.

Q. Do you know of anyone else there who was moved in a job? Was there another employee who was moved?

A. Well, Leanne Henry, she didn't have a particular job but she went to the position . . .

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. . . them done.

MS. ROZEK: So you would be happy to have these individual sticky notes?

MS. HORSEMAN: Yes. Whatever she's got. I want it all.

MS. ROZEK: Okay.

Q. Okay. So is there anything else, any other way that you contend that you were treated differently than what we've talked about?

A. Let me think. Well, in addition to the things that Marcia would say where she would always bring in reference to the N word up.

Q. Okay.

A. Constantly. Is that something different?

Q. Yes, that's something different.

A. Okay.

Q. Okay. So other than that which we're going to get to in a minute, is there anything else? I'm looking for a way that you were treated in the workplace, in terms of, you know, you alleged that you were treated differently than other employees.

A. Right. More work and less time.

Q. Okay. Those–

A. And they would lie to me about, when I would ask them about showing me, they wouldn't show me, you know, where I was making the mistake at, how I was making the mistakes. And then they told me that I was, told me that I wasn't doing enough clients and yet I could see that I was doing more clients than she was. She was allowed to take her time on them.

Q. Okay. Now, your Complaint does say that Marcia Shock used racially derogatory terms in your presence. What are you referring to?

A. She would always manage to say the N word or have something to say about, I don't know. Just blacks in general.

Q. Okay. What N word are you referring to?

A. Nigger.

Q. Okay. When she said that, would she refer to you?

A. Well, it depends on how you look at that.

Q. Okay.

A. If you're white, you probably would think that she was just saying that. If it was somebody black, it would be offensive to keep continuing to say that word especially when somebody tells you that they don't want to hear that.

Q. How many times did she –

A. So many I can't even count them. It just was a lot.

Q. Okay. Was anybody else present?

A. One time we were going down to, I think it was some kind of conference and I was in the car with Cheryl Rogers and her and she was talking about the O.J. Simpson case and she was asking something about it, if I saw it, and I told her before she even started that I felt that it was a case that people got very easily upset about and friendships were, you know, kind of ruined from stuff like that and so I would rather not discuss it. But she went on discussing it and ended up having the N word in it.

Q. Okay. And Cheryl Rogers is another black employee?

A. No. She's white. There were not that many black employees. I think I was the only one after that that was there.

Q. There was another black employee, though, when you started. Right?

A. At the very beginning, yes.

Q. Okay. So the only one person who witnessed her –

A. Well, the second one was with Arleen. There was a lady that came up that asked for directions to the voucher office and I told her where it was. She went in, got her stuff, left. When she came, she went out, Marcia came running down to the window and asked us real excitedly, did you see that, did you see that. And I said what, what are you talking about. She said that lady that just went. And I said well, yeah. And she said, you know, she said that, you know what she said and I said no. She said well, Arleen, she said that who is that lady right there and Marcia said she told her that that was her boss and she said oh, that looks just like a little nigger lady that used to work in Florida that I once knew, and I saw Arleen, I said see, that's what I'm talking about.

Q. She was repeating what that lady said?

A. Well, if that's the case, every client that came in there had that N word on their lips and I never noticed that before.

Q. Was the lady who she was referring to, was that a black lady?

A. It was a white lady. All these people were white that she said this.

Q. Okay. So when she said this, so Marcia came up and said that this lady had said this about Arleen.

A. Yes.

Q. Okay. So then the clients, and you say this word was used in the office by the client a lot?

A. That's what she said. She would always say well, this client said, you know, the N word for some reason or other. She'd bring out a sentence that somehow they said it. But I never heard that.

Q. Was your clientele primarily black or white?

A. Well, because we're more predominantly white it would be more whites but it was still probably a lot of blacks coming through there.

Q. And you never heard a black person coming through the WIC office that used the word nigger?

A. Never.

Q. Have you ever used that word?

A. When she said that.

Q. Beg your pardon?

A. When I was telling the lawyer and everybody else about her saying that. I try not to say it because the dictionary says it's a dirty, lowdown person. I try not to know those kind of people hopefully.

Q. So every time that Marcia Shock would say that word, the N word -

A. Uh-huh.

Q. - and we'll use that as our shorthand.

A. Yes.

Q. Okay.

A. I prefer it.

Q. Okay. And N word for the record meaning the word nigger, for that, every time that Marcia would use that word she was referring to someone else as having said it?

A. Yes. I think most of the time that's what she would say; that somehow she would always manage to say that somebody had said that word.

Q. Okay. And she never referred to you specifically as being that, did she?

A. I can't remember, but as far as I know, no. She said it so often that it kind of blurred and ran into – whether she said it to me or about me or somebody else, it was still just as offensive to hear the word.

Q. Okay. Did anyone else make any racially derogatory, use racially derogatory terms in your presence?

A. To my knowledge I don't remember anybody else saying it.

Q. Okay. Or saying any racially derogatory remarks?

A. To my knowledge.

Q. So then –

A. Oh, I want to backtrack because I did say nigger one time. There was a little white boy and his father that were going into Hook's and when I went in and came out, the little boy could barely talk, his english was not very good and he kept calling me that word but he, the way he talked you couldn't understand what he was saying and then it finally dawned on me what he said and I do remember that I did mention that to Arleen and them.

Q. Okay. So Arleen – so did you ever talk to Arleen about –

A. Yes. I told her about that and when she said that that time, I told her well, see, that's that I'm talking about. She always manages to get that word in some kind of way. You know, she always manages to bring it up.

Q. And what did Arleen say?

A. Just to ignore it or don't pay any attention to it.

Q. How many times did you talk to Arleen about it?

A. Quite a few times before they had moved me and then not as frequently afterwards.

Q. Before they moved you from the office that you were sharing?

A. That I was sharing with her.

Q. Sharing with Marcia?

A. Uh-huh.

Q. You need to answer yes or no.

A. Yes.

Q. And when you went in to complain all those times to Arleen before the move, what would you tell her?

A. I would just tell her about the things that she was saying and the comments that she would make and, you know, like there was a lady that came in that had

a, she was black and her baby was real light, and she would, you know, like call me over and say hey, hey, look at this. Look. You know, and I'd say what are you talking about? You know, what are you trying to show me? See that mom there, you know, because she was real dark and the baby was white. She'd do all kinds of things. Just all kinds of things. I mean there's so many it's hard to describe. She just done a lot of stuff that, what she was doing, she told me about the Ku Klux Klan and, you know, about them riding with sheets in their neighborhood, you know. And she said people that did their family like that when she was small.

Q. That the Ku Klux Klan came on her family?

A. That's what she said. But she was always saying stupid stuff like that. I mean Marcia was not a dark person. There was no way that she – and she's not Jewish, so there's no way that they had done that. But she was always making up some kind of stuff. If you had something wrong with you and you had a hemoglobin of 6, hers was less, you know, or whatever you had. I mean she was just one of those kind of people that had something to say about everything.

Q. So when she talked about the Ku Klux Klan to you, she was trying to tell you that she didn't like them because of what they did to her family?

A. Well, with her, it was hard to tell whether she was saying that or not. It was like she would try to find

things that would be offensive to upset you and try to dream up a scenario that it happened to somebody or someone.

Q. You found it offensive for her to tell you that, for whatever reason, that the Ku Klux Klan had ridden against her family?

A. Well, you would have to know Marcia to understand what I was talking about. Like I said, she had said the N word and there was a lot of things that she would talk about as a way to – I don't know what the word that you could use for it. It's somebody that's trying to be smart-alecky about it. She would like dream up episodes or scenarios, like I said, that I don't think really happened but she would always be saying them because she knew that, I mean it might not bother you, but after the hundredth time of hearing the word nigger, it's offensive to me. I get tired of it. And if you, I'm used to, I mean, you know, every black person has had that said to them and like that incident where the little boy said that. Okay. One or two times that she says nigger and it comes up in a conversation, I can understand that. But when you manage to do that every week at least to come up with this N word, it's very offensive to me and I'm tired of it and I don't want to hear about the Ku Klux Klan every week, either, and she would always try to manage some kind of way that she got this conversation.

Q. Did anyone else witness this conversation?

A. No. Now, she was pretty slick about that. Except for with Cheryl and Arleen that time, she was pretty good. She would try to draw me back or be in the room with me or she would come down to my office and say something because just moving her, my office, didn't really stop her. You know, she would come in there, nobody was in there, close the door and then say something.

Q. Do you believe that Arleen did nothing to stop Cheryl's remarks?

A. You mean Marcia's?

Q. I mean to stop Marcia's remarks intentionally because you're black? Do you think, was that Arleen's –

A. Well, she thought I should ignore it. I mean I don't think she would like somebody to call her honky every day. If somebody did that to her, that would be offensive and she would feel like something should be done about it, I'm sure.

Q. But do you –

A. Well, I can't speak for her, but I mean most people that are caucasian I'm sure would not want to be, have someone do that to them often.

Q. Do you think, though, that Arleen intentionally allowed it to happen?

A. Yes, because they knew that I was a pretty easy going person and I think that she felt . . .

* * * *

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. . . else right now. That should be it.

Q. Okay. After you went to the Mayo Clinic, you came back to work on what day?

A. Maybe that Monday or, Monday I think it was.

Q. Which would have been the 15th.

A. Don't quote me but I think it's the 15th.

Q. Okay. So when you showed up at work on that Monday, what happened?

A. I showed her the slip that I had from the doctor and showed her those papers and told her that, about he should be sending me some more papers on, telling about me being there, and at that time she told me that that wasn't enough, that I would have to have another paper. And so then I went back home and called, tried to get ahold of them. I couldn't get ahold of them at first but I did call within that day or the next day and told the Mayo Clinic which they were very upset with me because they said they had already given me a paper and I said well, it's not me, it's my boss that wants it. She wants another one.

Q. They gave you a paper that said you were okay to return to work?

* * * *

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. . . that would be another way to certify them.

Q. The performance reviews. When you were terminated, what was the explanation provided to you as to the reason for your termination?

A. She said you have not done well in your three evaluations and you're too sick to work.

Q. Okay. Now, when she said you were too sick to work. What do you mean she said you're too sick? She just said you're too sick to work ?

A. She just said you're too sick to work.

Q. And what did you say?

A. I basically didn't do anything. I just smiled. I mean I felt like if they had let other people go that had problems or medical problems and financial problems, then what could I say to make them change their mind about it.

Q. Was there anyone else in the room that heard Arleen say that you were too sick to work?

A. Judy Bargo, but there again, she's not going to say that that's what she said because later on I talked to her boss and he told me that Arleen had said I said that I was too sick to work.

* * * *

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. . . claiming was retaliation?

A. They gave me bad references.

Q. Okay. They gave you references that stated that you were discharged due to an unsatisfactory performance?

A. Yes.

Q. Okay. And you were told on the date of your termination that you were being discharged because of unsatisfactory performance. Correct?

A. Yes. That and I was too sick to work.

Q. Okay. Now, you went ahead and filed these applications with Saint John's. Correct? That was one of them that you're contending was the basis.

A. Yes.

Q. And then the other one was with Interim.

A. Yes. Right.

Q. And you went ahead and worked with Interim so whatever WIC said didn't keep you from getting the job with Interim. Is that correct?

A. No, but it would color their way of what they thought what I was supposed to do in my duties. There would be some question about . . .

* * * *

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. . . know, he wouldn't be somebody that you would be able to talk to about that. About anything, really.

Q. Because he had been sick you wouldn't?

A. Well, he had been off sick. I just got the impression that he could not take a lot of stress and by him being off like that and they said it took awhile for him to get himself together to come back because he stayed off from work maybe six weeks and they had to change his medication.

Q. On Page 81 of Defendant's Exhibit 13, that top paragraph, it says Arleen told me not to wear whites to work as late as 10-20. Marcia on this date was wearing a white top and, bottom?

A. Yes.

Q. Nursing outfit?

A. Correct.

Q. Now, when you say whites, for a person like myself whose not an RN, you mean the typical white nursing outfit?

A. Yes.

Q. Okay. Did you wear whites to work?

A. No. When I first hired in there I asked Arleen what we should wear and she said don't wear that because we want to make the clients feel comfortable. We want you in, you know, regular casual clothes, or what the clients would wear.

Q. Okay. So when you say she told you not to wear whites to work as late as 10-20, what do you mean as late as 10-20?

A. As late as that date. She told me when I first hired in that I didn't wear that, she didn't want me to wear that at all, but Marcia came in wearing whites and no one said anything to her about it. She could wear that.

Q. Did Marcia wear whites again?

A. Yes. She continued to wear whites.

Q. Did you make a note of that in here?

A. No. I just put it down that first time that she was -- because this had started from the time that she started

working there until this time and she was still wearing them.

Q. Okay. So you didn't make a note of that anywhere in this journal other than this one entry?

A. No. I was just bringing up the point that . . .

* * * *

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. . . week back after your cancer surgery. Correct?

A. Yes.

Q. Okay. So the first week back after your cancer surgery, and you had taken off I think it was February 6th? You were off from February 6th to March 27th?

A. Somewhere around there.

Q. Okay. So the first week back you had gone in and asked Arleen if you could take a vacation. Correct?

A. Yes.

Q. And then she told you that you had been off sick.

A. Correct.

Q. So you would have to wait at least a month to take your vacation. Correct?

A. Yes, I believe that's what she said.

Q. Okay. So then you asked Arleen if you could start taking your vacation, when you were able to start taking your vacation, if you could take it a day or two at a time as the other employees do.

A. Correct.

Q. And she told you no.

* * * *

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. . . accommodations and I felt that was being treated differently.

Q. Okay. When you're saying the accommodations, we're talking about leaving work early an hour or coming in later an hour?

A. Correct.

Q. And we're talking about a conversation that occurred on September of you first evaluation and then you raised it again with Sue at the second evaluation.

A. Right.

Q. Okay. So those were the two times that we're talking about that you went to tell her.

A. And I talked to Steve because he wanted to know what was wrong with me and I talked to him on the phone, also.

Q. Now, was this after you were discharged?

A. This was – well, it was before and after. When we were talking about this book –

Q. You're pointing to Defendant's–

A. This personnel policies handbook.

Q. Okay.

A. And something he was talking to me about and I was telling him about the illnesses that I had and he didn't say it but the way he, the questions that he asked me was like he didn't believe that I had actually went to the Mayo Clinic and that I was actually sick.

Q. So this was, you were talking to him about the book.

A. Correct.

Q. Did you call him?

A. No. That was what I said. He had called to talk to somebody else about something and I asked could I talk to him on the telephone.

Q. And he–

A. And then that's when I went through and told him about, you know, the policy book and that that was the first time that I had ever got one. About being ill and how – what did I say to him? – about being ill, what I had had wrong with me and, I don't know. He wasn't very receptive. It was like he never he didn't believe anything that I said about that; about going down there.

Q. Well, when you talked to him, did you tell him that you wanted – you just told him you were ill?

A. I told him the different things that had happened that they had said that was wrong with me.

Q. Okay. And that was the extent of your conversation with him?

A. I think that's basically it. And somehow I don't know whether right after Arleen let me go, I don't know whether I talked to him on the phone before I left or whether I had called, but there was at one point where we had talked and he had said that Arleen had said that I was too sick to work – no. He said that Arleen said that I didn't, that was Areleen that said that.

Q. And that was the extent of it?

A. Yes. I think, as far as I know. I mean I can't remember.

Q. Okay. And so did you talk with any with anyone else about your complaint or about allegedly being treated differently because of your alleged disability?

A. My lawyer. Debbie Counsler.

Q. Who's Debbie Counsler?

A. She was the lady that was fired and that I was put into her job.

Q. Okay. Now, why did you talk to Debbie . . .

(2)

Supreme Court, U.S.
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No. 00-1144

In The

Supreme Court of the United States

CHERYL K. MCPHAUL,

Petitioner,

v.

MADISON COUNTY BOARD OF HEALTH, BOARD OF COMMISSIONERS OF MADISON COUNTY, and ARLEEN HORINE, in her official and individual capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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11pp

PARTIES TO THE PROCEEDING

Petitioner, Cheryl McPhaul, is an individual and not a corporate entity.

Respondents, Madison County Board of Health, Board of Commissioners of Madison County, and Arleen Horine, in her official capacity, are governmental entities. Respondent, Arleen Horine, in her individual capacity, is an individual and not a corporate entity.

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OPINIONS BELOW

Petitioner provides the correct citation for the Seventh Circuit Court of Appeals ("Seventh Circuit") opinion. However, the district court opinion reported at 976 F.Supp. 1190 (S.D. Ind. 1997) is not the opinion included in Appendix B to the petition. The cited opinion is an earlier ruling in this case on a motion to dismiss, and that ruling has not been appealed to either the Seventh Circuit or this Court. The district court opinion in Appendix B is the one at issue in these appeals.

JURISDICTION

Respondents have no material dispute with petitioner's jurisdictional statement.

STATEMENT OF THE CASE

Petitioner, Cheryl McPhaul ("McPhaul") takes liberties in stating the evidence as presented to the district court. McPhaul presents disputed facts irrelevant to the issues decided by the Seventh Circuit, and omits materially undisputed facts which are relevant to the issues decided. For example, McPhaul selectively cites to her own deposition transcript in Appendix C, yet many of the citations are to conclusions, not facts, and do not support the proposition for which they are cited. The pertinent undisputed material facts are set forth in the Seventh Circuit Court of Appeals ("Seventh Circuit") opinion (Appendix A) and the District Court opinion (Appendix

B). All references in this brief to the Appendix are to the appendices accompanying the petition of McPhaul. The procedural history set forth by McPhaul is generally accurate.

REASONS FOR DENYING THE PETITION

A. PETITIONER CITES NO AUTHORITY IN CONFLICT WITH THE SEVENTH CIRCUIT'S DECISION IN THIS CASE

This Court may deny the petition for a writ of certiorari because the Seventh Circuit's opinion has not been shown by McPhaul to conflict with any decision of this Court, of another Circuit, or of any other court. Nor has McPhaul shown the decision to conflict with the U.S. Constitution or any federal statute or regulation.

1. No Conflict with Decisions of this Court or other Circuits

McPhaul makes no argument that the Seventh Circuit did not follow the proper law from this Court. The six (6) Supreme Court cases cited by McPhaul are cited for uncontroversial legal propositions. The six (6) Seventh Circuit opinions cited and the opinion in this case are not argued to be contrary to the proper interpretation of the Americans with Disabilities Act (ADA) or the Fourteenth Amendment Equal Protection Clause. Plaintiff only argues that her facts meet the required elements. For all the reasons set forth by the district court and the Seventh Circuit, they do not.

Not a single court opinion is offered as being contrary to the decision in this case. This Court has a "usual preference for cases that present actual conflicts". *Lambert v. City and County of San Francisco*, 529 U.S. 1045, 1552 (2000) (Scalia, joined by Kennedy and Thomas, dissenting from denial of certiorari); Sup. Ct. R. 10. The Seventh Circuit's opinion in this case is unremarkable in that no new law is established, and no new analysis is provided for future cases. In short, McPhaul simply wants one more court to review the facts for her two claims in hopes that a Phoenix will rise from the ashes. That is not the function of the Supreme Court. See Sup. Ct. R. 10.

2. No Conflict with Federal Statutes or Constitution

Similar to the case law cites, McPhaul offers the standard citations to the ADA statutes and regulations. McPhaul does not argue the Seventh Circuit erred in applying the ADA or the regulations under the ADA. What McPhaul does in her petition is set forth the elements of the claim, cite evidence which she believes sufficient (usually only her own self-serving and conclusory deposition statements), and then states a conclusion that the element was met. In each instance, the element was not met, as the district court and Seventh Circuit ruled.

The same is true with regard to the Fourteenth Amendment Equal Protection Clause claim. Additionally, the entire second question by McPhaul addresses an argument on the disparate treatment that was not at issue before the Seventh Circuit. The Seventh Circuit dismissed

her disparate treatment claim under the Equal Protection Clause because she failed to present a prima facie case. (Appendix A pp. 9a-13a) Yet McPhaul's second question presented focuses on whether she could establish pretext. Pet. for Writ of Cert. p. (i). The Seventh Circuit's decision had nothing to do with the issue of pretext, because it did not have to reach that issue to decide the case.

The third question presented focuses on McPhaul's hostile work environment claim. This claim was addressed on appeal only against Arleen Horine. (Appendix p. 13a) Yet McPhaul agreed that it was a co-worker, not Horine that made the three comments that McPhaul considered harassment. (Appendix pp. 13a, 15a) None of the three comments were about McPhaul (Pet. for Writ of Cert. p. 2), and while she found them offensive, the comments did not interfere with her work performance. (Appendix p. 16a) There was no evidence that Horine deliberately or recklessly allowed the co-workers' comments and no evidence that Horine failed to act because of racial animus. (Appendix p. 17a) Again, no new law was formed or applied here. This case just involves a petitioner's belief she had sufficient evidence when she really did not.

B. THE SEVENTH CIRCUIT'S DECISION IS FACT-BOUND AND WILL LACK SIGNIFICANT IMPACT ON OTHER CASES

Any decision involving McPhaul's case will necessarily be fact-bound. "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). But McPhaul presents

no basis for believing this is anything more than a typical case of applying undisputed facts to established law. Importantly, McPhaul's petition fails to identify a single opinion from any state or federal court which is factually indistinguishable from this case. No case is presented as deciding these facts directly contrary to the way the Seventh Circuit did. Either the facts are not typical, or the issue is not as important as McPhaul argues. The decision did not hinge on adopting one legal theory over another. Rather, the Seventh Circuit simply applied uncontroversial propositions of law to the facts of the case.

A brief review of McPhaul's petition will confirm that her arguments are very fact-sensitive. McPhaul had the duty to present facts to the district court which would establish her claims. Fed.R.Civ. P. 56. Both the district court and the Seventh Circuit found the facts she submitted were insufficient. All McPhaul does now is claim both courts were wrong in how those facts match up to the law. Such fact-bound arguments are not suited for Supreme Court review. *See NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n. 8 (1981). The decisions below gave full consideration to the facts presented and decided the issues raised correctly.

C. PETITIONER DOES NOT IDENTIFY ANY SPECIFIC ERRORS OF LAW OR SUBSTANTIAL DEPARTURES FROM THE ACCEPTED COURSE OF APPELLATE REVIEW TO MERIT REVIEW BY THIS COURT

This is an easy case. Petitioner's Table of Authorities cites six (6) United States Supreme Court decisions, and

six (6) Seventh Circuit decisions. No departures from prior Supreme Court precedent are presented. Nor are any conflicting Seventh Circuit decisions argued, and of course McPhaul does not even attempt to argue cases from other circuits or districts. Therefore, any legal error would be unique to this case and based entirely on the factual circumstances present here. If a case does not have far-reaching impact beyond the parties, it is not well-suited for review by the Supreme Court. *See Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393 (1923). McPhaul has not shown in her petition how this case will have impact on federal law outside of its application to this case.

D. ALTERNATIVE GROUNDS EXIST FOR AFFIRMING THE SEVENTH CIRCUIT'S DECISION ON THE ADA CLAIM

Even if the Seventh Circuit erred in any of its rulings, alternative grounds exist upon which the decision can be affirmed. On the ADA claim, the Seventh Circuit did not reach the issue of whether McPhaul failed to establish that she was disabled. If the Seventh Circuit had reached this issue, McPhaul offers no reasonable basis for believing the Seventh Circuit would have reached a conclusion different than the district court did on this issue. The district court's conclusions are located at Appendix B pages 25a to 31a. The Seventh Circuit also did not reach the alternative arguments addressed by the district court that McPhaul produced insufficient evidence that she was unable to perform major life activities or that she is substantially limited from working a class of jobs. The

district court's conclusions on these points are also correct. (Appendix B pp. 31a-35a) Thus, this is not a good case for granting certiorari on the ADA question as several grounds exist for the Seventh Circuit's decision to affirm the District Court.

CONCLUSION

For the foregoing reasons, Cheryl McPhaul's petition for writ of certiorari should be denied.

Respectfully submitted,

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